United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

ORIGINAL.

75-7013

United States Court of Appeals

For the Second Circuit.



SECURITIES AND EXCHANGE COMMISSION,
Plaintiff Appellee,

-against-

CAPITAL GROWTH COMPANY, S.A. (Costa Rica), CAPITAL GROWTH COMPANY, S.A. (Panama), NEW PROVIDENCE SECURITIES, LTD., S.A., SHEFFIELD ADVISORY COMPANY, SHEFFIELD ADVISORY COMPANY, S.A., EHG ENTERPRISES, INC., CLOVIS W. McALPIN, SANFORD C. SHULTES, ARIEL E. GUTIERREZ and ENRIQUE H. GUITIERREZ,

Defendants,

ARIEL E. GUTIERREZ, ENRIQUE H. GUTIERREZ and EHG ENTERPRISES, INC.,

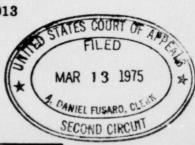
Defendants-Appellants.

On Appeal From The United States District Court For The Southern District Of New York

Appellants' Appendix

IRVING RADER
Attorney for Defendants-Appellants
335 Broadway
New York, N.Y. 10013
925-2280

GILBERTO MAYO and RAFAEL CUEVAS Co-Counsel P.O. Box 13802 Santurce, Puerto Rico 00908



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Excerpts From Stenographers Minutes Of Hearing Dated September 3, 4, 1974 Arguments of Richard L. Jaeger, Esq. In Support Of Application And Comments Of Court Below	, 48A-57A
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Prelim nary Injunction And Appointment Of A Receiver Dated September 24, 1974	. 67A-71A
Notice of Motion Dated October 30, 1974, To Quash Service, To Vacate Preliminary Injunction And Appointment Of Receiver, To Set Aside Default And To Extend Time To Plead Or Answer Of The Defendants, EHG Enterprises, Inc., Ariel E. Gutierrez And Enrique E. Gutierrez, With Supporting Affidavit Of Ariel E. Gutierrez.	
Affidavit In Opposition To Above Application Made By Meryl E. Wiener, Esq. From Securities And Exchange Commission	. SEA-97A
Reply Affidavit of Irving Rader In Support Of Above Application Of EHG Enterprises, Inc., Arial E, Gutierrez And Enrique H. Gutierrez,	. 98A-104A

Excerpts From Stenographers Minutes Of Oral Argument On Above Application Dated November 25, 1974 Decision of Court on Application of the Defendants, EHG Enterprises, Inc., Ariel E. Gutierrez And Enrique H. Gutierrez To Quash Service, To Vacate Preliminary Injunction And Appointment Of Receiver, To Set Aside Default And To Extend Time Answer of Defendants, EHG Enterprises, Inc., Ariel E. Gutierrez And Enrique H. Gutierrez To The Complaint 110A-112A Memorandum of United States Distri : Judge Charles E. Stewart, Jr., 'So Ordered',
Dated December 31, 1974, That The Preliminary
Injunction Issued By The Court Dated
September 24, 1974 September 24, 1974, Is Binding On The Defendants, EHG Enterprises, Inc., Ariel E. Gutierrez And Enrique H. Gutierrez 113A-131A

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DOCKET ENTRIES



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	PROCEEDINGS	Date Cr. Judgment
DATE		
3-71	Filed pitfs, memorandum of law in support of their requests for TRO	
-337.9-74	prel. infunction and applt of a receiver.	
	prel. in uncertain and appropriate detre spow cause on	
3=D.9-14	Sept. 13,1974 at 9:30am in Rm.128 why a prel. injunction	-
<u>·</u>	Sept. 13,1974 at 9:30am in Rm.126 why a pietral defect as indicated should not be issued enjoining and restraining defts, as indicated: ORDERED	ea;
	sh ald not be issued enjoining and restraining soldiested; ORDERED way a receiver should not be appointed, etc. as indicated; ORDERED way a receiver should not be appointed, etc. as indicated; ORDERED	by
	that service of this order be served upon defts. by Sept. 4,1974	0.
	may be made by any employee or agent to the the	
Sep. 9-7	Filed pltfs. affdt. of notice of Meryl Wiener. Filed pltfs. affdt. of service by Meryl Wiener. Filed pltfs. affdt. of service by Meryl Wiener. Filed orderORDERED that the TRO issued on Sep. 3,1974 is est. as	
Sep. 9-7	4Filed pltis. affec. of service TRO issued on Sep. 3,1974 is est. as	to
30. 13-7	defts. Capital Growth Co., SA(Costa Rica), Capital Growth Co.	
-	SA(Panama), New Providence Sec, Ltd., EAG Enterprises, Inc, Clovis	
	Colon Ariel Cuttlerrez and Enlique Gatterios	
		+
Dep. 24-7	Sep.23,1974. Stewart, J. m/n White memo end. on pltis. order dated Sept.13,1974 - The TRO white was entered on Sept. 3,1974 on notice to all parties and ext. in was entered on Sept. 3,1974 on notice to all parties is ext.	Seat.
	was entered on Sept. Silver to all parties is evi-	
	13,1974 for a 10 day period on notice to air parties, in the arms on a further period of 2 days during which time a hearing on a for a further period of 2 days during which time a hearing on a	
	for a turther period of 2 days during m/n.	
:7	for a further period of 2 days during which the a heating on a prel, injunction will be held. Stewart, J. m/n. prel, injunction and appt. of a receiver-ORDERED foat defts. 4 filed prel, injunction and appt. of a receiver-ORDERED foat defts.	
10.P. 124-7	4 filed prel. injunction and appt. of a receiver occurrence of the size enjoined and restrained pending the sized determination of the enjoined and restrained pending the final hearing and	1
	are enjoined and restrained pending the final hearing and action as indicated; ORDERED that pending the final hearing and	+
,	determination of this action, inthe Car College Nice and Capital	-
	receiver of derts. Capital Glower file with this court	
-	Growth Co., SA; ORDERED that the said leterver in the said leterver in the said leterver a bond satisfactory within 5 days from the date of his appt. a bond satisfactory within 5 days from the date of his appt. as indicated. Stewart	
	to this court in the amt of \$10,000,etc. as indicated. Stewart,	,
	to this court in the and of the	100:33
205 76	m/n Writed consent order that the time of defts Southes, Saetheld Adv	TPOT.
;-pc	To and Sherrield Advisory ou .DA co date	-
	Oct 8:1974 So ordered, Stewart.J.	emnity
Sep. 26-	74 Filed bond in the amt. of \$10,000 by the Hartfold Accident and	1
-:	Co. Constant for an order approving	
Sep. 30-	74Filed reciever's affdt. and notice ofmotion for an election receiver so retain receiver's surety bond and authorizing the receiver to retain receiver's surety bond and authorizing the receiver to retain receiver's surety bond and authorizing the receiver to retain	
	receiver's surety bond and authorizing the iscelver to be the firm of Barrett, Smith, Schapiro and Simon as attys. ret. on the firm of Barrett, Smith, Schapiro and Simon as attys.	
	Oct 10 1974	74
Sep 30-	Oct. 10,1974. Oct. 10,1974. 74 Filed pitts. aifdt. of service by New Wiener that on Sept. 25,19	+
	the served copies of the street as intracted.	
	by registered mail(air mail) on defts., etc. as idicated. by registered mail(air mail) on defts., etc. as idicated. 7. Filed pltfs. affet. of service by Meryle Wienrer that on Cot. 3,15	74
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	ne served honers will be	
17	Oct. 21,1974.	13
Jet. 4	74 Filed interim re port of receiver the Schiffield Advisory Co. and 74 Filed defts. Sheffield Advisory Corp., Schiffield Croup).	
# 2t.11-	74 Filed derts. Sherrield Advisory Corp. (Sheffield Croup).	LCC.
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	. D. c. 110 Rev. Ci	vil Docket Continuation	2A .	
	DATE	***************************************		PROCEEDINGS
	Oct.23-	injunction a	s to defts. Si	he hearing on pltfs. motion for prel. heffield advisory Corp, Sheffield
		Advisory Co.	the TRO ente	red as to said defts. is ext. to Oct.
	0 : 02 7	29,1974,etc.	as indicated	. Stewart, J.
	Oct 24-74	Filed pitfs. al	proving boand	and authorizing receiver to retain
	000.24	councel ORI	DERED FITT the	surety bond filed with the clerk
		of the court	is satisfacto	r y ;ORDERED that said receiver is autho arrett, Smith, Schapiro and Simon of
	-	26 Rduy NYC	for legal advi	ce.etc. Stewart.J. m/n
	Oct.30-7	4 Filed final iu	dgment of perm	manent injunction as to dert. Sanford
,	0-4 20 7/	Shultes as in	dicated.Stewar	et, J. m/n judgment entered, Clerk on 10/31 ment injunction as to deft. SHEFFIELD
		ADVITEDBY CO	as indicated	Stewart I m/n judgment entered clerk it
	Oct.31-74	Tilad dofte Fi	C Croup affet	and notice of mtolon to quash service,
		ונית פלפתחום	iniunctional	Mov. 14,1974 at 10am in Rm.1305.
	Oct 31-7/	Filed FHG Groun	defts. memora	anudm of law in support of above motion.
C	ort 25-74	Filed nitres. at	fdt. of service	ce of Meryl Wiener.
C	ot. 25-74	Filed pltfs. af-	Jt. of service	by Meryl Wiener.
***	6 7/ 71	The dependent in the	record or are	by Meryl Wiener. occedings dated Sept. 24,1974.
Oc	t. 29-74	fled summons wit	h artar, or be	ersonal return or Ecuardo Blancochat on
		Sept. 17.1940	he served der	rts. End Enterprises, Ariel Gutlerrez and
		Earique Gutle	rresithat on S	Sept. 19,1974 Roberto Tovar Capital Growth Co.,SA(Costa Rica),Capital
		Grouth Co. SA	(Panama) and I	New Providence Sec. Ltd. SA: and was also:
		served on def	ts. Shultes, St	heffield Advisory Co. and Sheffield Advi-
,	Vov. 18-7/	Co., SA by J.	Lunney on 9/3/	ver OSCORDERED that Capital Cowch,
•	150.10-74	SACCOSTA BIC	a) Capital Gre	outh CoSA (Panama), New Providence
		Sec. Clovis	McAlpin. 1.22 V	orld Properties Intl, Clyde Hargis, Charles
		Liberis, Torr	wald, Lang and	Lee, Robert Benz, 1st natl. Bank (Miami), pire Bank of h. f. Merrill Lynch who desire
1		to object of	the entry of	the proposed order attached show cause
1		on way 21	974 in Ra. 150	5 at 4:30pm why the order should not be
	•	entered;ORDE	RED that pend	ing final determination of this motion, ind from instituting any interpleader
		or orner act	tion in any co	urt with respect to any monies belonging
		to doste C	יחודים בייוים	Co. Costa Rica and Pana: ORDERED that sex.
		be made on o	iefts. Capital	Growth (Custa Rica and Penama), New provide istered air mail by Nov. 18, 1974 at 5pm, ct
		as indicate	I Stewart J.	
ï	ov. 18-74	Tilled nilite man	arabuda in opt	position to special appearance and motion
		hu corte f	antorner cos	Ariel Cuterrez and Enrique Gutierrez to a junction and appt. of receiver and to set
		cofanit		
6	Nov. 18-7	A Filed pitts.	ffdt. of Mary	Wiener in s ort of above.
	Nov. 13 - 74	Filed pleis. at	idt. of servi	ce by Meryl William.
				proceedings dated Sept. 3,4, 1974.
	NOV_75-75	riled rangever	Henant Armstr	ong supplementary affdt, of Peter Agovine
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Nov.70-74 Filed order-ORDERED that the receiver shall take all steps necessary to assume possession of the monies depositied in theaccount of defts Unpital Couth Co.SA(Costa Rica) and Copital Couth Co.SA(Costa Rica) and Couth Co.SA(Costa Rica) and Couth Co.SA(Costa Rica) and Color Rica Rica Rica Rica) and Co.SA(Costa Rica) and Costa Rica Rica) and Costa Rica Rica Rica Rica Rica Rica Rica Ric	ov. 26-74 Filed order- ORDERED that the recolver shall take all steps necessary to assume possession of the monies depositied in theaccount of defts Capital Couth Co. SA(Costa Rica) and Capital Couth Couth County and the Bradford Turst Co. in NY and the Bradford Turst Co. in NY and the Ist Natl. Bank of Miami, in Miami, Florida, etc. as indicated Stewart, J. m/n ov. 26-74 Filed End Group, (defts. ENG Enterprises, Ariedl Cutierrez and Enrique Couth Cou			1 -
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

V.

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. McALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ,

COMPLAINT

Defendants.

The Plaintiff SECURITIES AND EXCHANGE COMMISSION ("Commission") hereby alleges:

1. Defendants CAPITAL GROWTH COMPANY, S.A. (Costa Rica), CAPITAL GROWTH COMPANY, S.A. (Panama), NEW PROVIDENCE SECURITIES, LTD., S.A., SHEFFIELD ADVISORY COMPANY, SHEFFIELD ADVISORY COMPANY, S.A., EHG ENTERPRISES, INC., CLOVIS W.

MCALPIN, SANFORD C. SHULTES, ARIEL E. GUTIERREZ and ENRIQUE H. GUTIERREZ have engaged, are engaged and are about to engage in acts and practices which constitute and will constitute violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5, as more particularly specified herein, and unless remained and enjoined will continue to engage in such acts and practices.

JURISDICTION AND VENUE

- 2. The Commission is authorized to bring this action pursuant to Section 21(e) of the Exchange Act, 15 U.S.C. 78u(e), to enjoin such acts and practices.
- This Court has jurisdiction of this action under
 Section 27 of the Exchange Act, 15 U.S.C. 78aa.
- 4. Acts, practices, courses of business and transactions which constitute violations of the Exchange Act were effected by the use of the means and instrumentalities of interstate commerce, the mails, and the facilities of national securities exchanges. The acts and transactions constituting the violations of law complained of occurred, among other places, within the Southern District of New York.

THE DEFENDANTS

5. Defendant Capital Growth Company, S.A. (Panama) was incorporated in Panama on August 4, 1972 as a wholly-owned subsidiary of the Costa Rican corporation of the same name, Capital Growth Company, S.A. (Costa Rica), and acquired substantially all of the investments of the Costa Rican corporation on that date. The preferred shares of Capital Growth Company, S.A. (Costa Rica) are held by approximately 16,000 public investors. On July 10, 1971, Capital Growth Fund, S.A. was converted into a closed-end investment company and on September 24, 1971 changed its name to the aforementioned Costa Rican corporation, Capital Growth Company, S.A. Capital Growth Fund, S.A., a Costa Rican corporation, on May 15, 1971 and August 12, 1971, respectively, acquired substantially all of the net assets of Capital Growth Fund, an open-end Bahamian investment trust, and Capital Growth Real Estate Fund, Inc., an open-end Panamanian investment company whose stated policy it was to invest in income producing real

estate. The aforesaid entities are referred to herein collectively as the Capital Growth companies unless otherwise indicated.

- 6. At all times relevant to this complaint, the defendant New Providence Securities, Ltd., S.A. ("New Providence") and its predecessors have served as investment manager for the Capital Growth companies and own all of the common stock of the Capital Growth companies. Approximately sixty percent (60%) of the outstanding voting securities of New Providence are owned or controlled by defendant Clovis W. McAlpin.
- 7. Defendant Sheffield Advisory Company, S.A. is a Panamanian company with offices in New York, New York. It is the successor to defendant Sheffield Advisory Company, a New York limited partnership with offices in New York, New York. Unless otherwise indicated, a reference herein to "Sheffield" shall include Sheffield Advisory Company, S.A. and its predecessor. From on or about April 1, 1971 to on or about July 1, 1973, Sheffield served as investment adviser to New Providence with respect to the investment and reinvestment of the assets of the Capital Growth companies.
- 8. Defendant ENG Enterprises, Inc. ("EHG"), incorporated and having its principal offices located in the Commonwealth of Puerto Rico, is primarily engaged in real estate management, development and construction in Puerto Rico and in the State of Florida.
- 9. Defendant Clovis W. McAlpin ("McAlpin"), a resident of Costa Rica, has at all times relevant to this Complaint, served as president and chairman of the boards of directors of and controlled the Capital Growth companies and New Providence and its predecessors.

- 10. Defendant Sanford C. Shultes ("Shultes") is a United States citizen and a resident of New York, New York. At all times relevant to this Complaint Shultes managed and directed the affairs and was a substantial owner of Sheffield. From on or about October 15, 1971 to on or about July 25, 1972, Shultes was a director of New Providence and the Capital Growth companies.
- 11. Defendants Enrique N. Gutierrez and Ariel E. Gutierrez are brothers, naturalized United States citizens and residents of the Commonwealth of Puerto Rico. They are respectively chairman of the board and president of EHG, and own 98% of the common stock of EHG between them.

SECTION 10(b) OF THE EXCHANGE ACT AND RULE 10b-5 THEREUNDER

- 12. Paragraphs 1 through 11 are hereby realleged and incorporated by reference.
- 13. From at least September 1968 up to and including the present, in the Southern District of New York and in other parts of the United States, among other places, the defendants singly and in concert, directly and indirectly, and aiding and abetting each other, in connection with the offer, purchase and sale of securities, including the shares issued by the Capital Growth companies and the portfolio securities of said companies, by the use of the means and instrumentalities of transportation or communication in interstate commerce and of the mails have been and are now, (1) employing schemes, devices and artifices to defraud, (2) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they

are made, not misleading, and (3) engaging in acts, practices and courses of business which have operated and would operate as a fraud and deceit upon public investors in violation of Section 10(b) of the Exchange 20t, 15 U.S.C. 78j(b), and Rule 10b-5 there-

14. From in or about 1965, and continuing until at least June 1971, the Capital Growth companies, New Providence and its predecessors, McAlpin and others offered and sold redeemable securities of the Capital Growth companies pursuant to prospectuses which stated, among other things, the following, and statements of similar import and effect:

under, 17 CFR 240.10b-5, as hereinafter set forth.

"Capital Growth Fund invests primarily in shares of companies selected for their growth potential and from time to time, in United States Government Bonds. Each of the companies represents leading corporations within growth industries.

"Capital Growth Fund is one of the few mutual funds operating outside of the United States whose underlying investments are primarily in United States securities, whose Management Company has a Board of Directors primarily composed of executives within the United States.

"Capital Growth Fund's investments are primarily in companies of large growth potential with emphasis on United States industry. Selected investments will be made in other areas of rapid economic growth and financial and political stability.

"The Fund's assets are invested with the assistance of investment advisors who are registered with the Securities and Exchange Commission of the United States. The portfolios they manage are wholly owned by Capital Growth

Fund. These portfolios are separated for evaluation, accounting, comparison and audit. The accounts of all of the portfolios appear in a consolidated statement audited by Price Waterhouse and Co. and do not appear as individual investments.

"Each investment advisor is under contract with the management company and is independent of the others. While the advisors are selected on the basis of their proven ability in the investment of money, the depth of their research, and their aggressive attitude in the use of capital, their one-year contract is renewable only on satisfactory performance of their portfolio.

"Arawak Trust Company, Limited is the Trustee of Capital Growth Fund and is responsible for all transactions effected for the Fund. This independent trust company, a Bahamian corporation, was formed by a number of independent banks.

"The Sponsor [a subsidiary of the Management Company] will liquidate the shares in the Planholder's account at 100% of the net asset value at the time instructions are received."

15. Commencing in or about September 1968 and continuing to the present, McAlpin, the Capital Growth companies, New Providence and its predecessors, and at various times the other defendants and other persons, have engaged in a course of conduct designed to convert and misappropriate the assets of the Capital Growth companies for their own benefit to the detriment of their shareholders. This course of conduct consisted of a series of self-dealing transactions, including the elimination of the independent trustee, the close-ending of the Capital Growth companies and the diversion of the marketable assets of said companies into closely-held, newly-formed entities owned or controlled by certain of the defendants and persons associated with them. As of December 31, 1968, the net assets of the Capital Growth companies consisted largely of marketable securities having a value of \$78,000,000. Current information indicates net assets of approximately \$14,200,000 representing largely illiquid investments in closely-held and newly-formed companies.

THE SAN CRISTOBAL TRANSACTION

- 16. On or about September 30, 1968, McAlpin, New Providence and others caused the Capital Growth companies to invest \$2 million in cash in a newly-formed Costa Rican shell corporation, Sociedad Agricola Industrial San Cristobal, S.A. ("San Cristobal"), whose shares were not publicly traded. For their investment, the Capital Growth companies received fifty percent of the common shares of San Cristobal for a total equity interest of forty percent. Their co-venturer, a Costa Rican limited partnership of the same name owned and controlled by the family of Jose Figueres ("Figueres"), who at that time was the former president of Costa Rica and a candidate for re-election to that office, contributed to San Cristobal its net assets having a negative book value of \$157,000 which were recorded on the books of the new corporation at \$3,000,000. For its contribution, the limited partnership received the remaining fifty percent of the common shares and all of the preferred shares, for a controlling equity interest of sixty percent.
- 17. The aforesaid investment of the Capital Growth companies departed from the kinds of investments previously made by said companies in publicly-traded securities, and was contrary to the representations and restrictions contained in, among other things, the prospectuses of said companies.
- 18. Thereafter, in or about July 1972, concurrent with an investment in San Cristobal of \$2,150,000 by IIT, an International Investment Trust ("IIT"), a mutual fund controlled by Robert L. Vesco ("Vesco") and others, the Capital Growth companies resold \$500,000 of their shares to San Cristobal for a \$500,000 unsecured promissory note not payable until July 1977.

- 19. Interest payments on the \$500,000 note held by the Capital Growth companies were due annually commencing in July 1973.
- 20. Those in control of San Cristobal have failed to publish adequate and accurate financial information or San Cristobal.

PURCHASE OF EHG SHARES

- 21. In or about September 1969, McAlpin, New Providence and others caused the Capital Growth companies to acquire 23% of the equity of EHG, represented by 200,000 shares of its common stock, for \$2,005,000 in cash.
- 22. As of the date of the purchase, the Capital Growth companies paid approximately \$1,400,000 in excess of their equity interest in EHG.
- 23. Of the \$2,005,000 received by EHG on the transaction, at least \$900,000 was contemporaneously disbursed by EHG in the following manner: \$400,000 as a loan to New Providence; \$100,000 as a "brokerage commission" to New Providence; and \$400,000 for the purchase of bonds of the National Liberation Party of Costa Rica. In addition, EHG transferred 10,000 of its shares to the uncle of the Gutierrezs, Dr. Alberto Inocente Alvarez ("Alvarez"), as a finder's fee.
- 24. The investment of the Capital Growth companies in EHG was another departure from the kinds of investments previously made by said companies in publicly traded securities, and was contrary to the representations and restrictions contained in, among other things, the prospectuses of said companies.

ELIMINATION OF THE INDEPENDENT TRUSTEE: CLOSED-ENDING OF THE CAPITAL GROWTH COMPANIES

- 25. As a result of the disputes concerning the propriety of investments and prospective investments by the Capital Growth companies, Arawak Trust Company, Limited ("Arawak"), the then independent trustee of the Capital Growth companies whose responsibilities included protection of the trust property, protested and took steps to terminate itself as trustee and to seek the appointment of a successor.
- 26. McAlpin, New Providence and others used this opportunity to eliminate the vital office of independent trustee through the sham appointment of Sion Plaza, S.A. "Sion") on or about May 3, 1971, which was removed shortly thereafter as a prelude to the close-ending of the Capital Growth companies.
- 27. Two weeks after its appointment Sion was removed, and shortly thereafter McAlpin, New Providence and others unilaterally and without prior notice to or approval of shareholders close-ended the Capital Growth companies, thereby extinguishing the shareholders' right to redeem.
- 28. The elimination of Arawak as trustee, and the subsequent elimination of Sion as trustee, was effected without prior notice to or approval of the shareholders, and deprived shareholders of the vital protections afforded by an independent fiduciary obligated to disburse funds and release securities and other assets only in accordance with a trust agreement.
- 29. Voting control in the newly close-ended companies was in a new class of common stock issued to New Providence for a total consideration of \$100.

30. In or about May 1971, Capital Growth Real Estate

Fund ("the Real Estate Fund") was also close-ended and shortly

thereafter, on or about August 12, 1971, was merged into Capital

Growth Company, S.A. on the basis of 2.5 shares of the latter for

each share of the former, all without prior notice to or approval

of the shareholders of either company and to their substantial

detriment.

THE REPURCHASE OF THE ENG SHARES AND THE MISSING \$300,000

31. On or about September 28, 1972, Vesco and others caused IIT to purchase from EHG for \$9,500,000, an equivalent amount of subordinated debentures of the company's subsidiary due September 1987 (with warrants to buy common stock of EHG). At the same time, Vesco and others caused Venture Fund (International), N.V., another mutual fund owned by them, to purchase from EHG for \$2,500,000, 250,000 shares of the company's newlycreated class of cumulative convertible preferred stock. For three months prior to the financing engineered by Vesco and his group, EHG had attempted unsuccessfully through Hornblower & Weeks-Hemphill, Noyes, Incorporated, to place \$6,000,000 of 15 year notes with warrants to purchase common stock of the company. At the end of August 1972, Alvarez, a director and shareholder of EHG, as well as a Costa Rican resident who was aiding Vesco and his group in their efforts to relocate in Costa Rica, introduced them to Enrique and Ariel Gutierrez for the purpose of arranging financing. Although ENG was seeking only \$6,000,000 in financing, Vesco and his group proposed that ENG accept \$12,000,000 instead. EHG accepted the proposal, and upon receiving the proceeds of the financing on or about September 28, 1972, pursuant to prior arrangement, deposited \$6,000,000 with the Bahamas

Commonwealth Bank, Ltd. ("BCB"), a Vesco-controlled bank, in return for a negotiable certificate of deposit, not withdrawable for six months, bearing 4% interest per annum. Alvarez received a finder's fee of \$290,000 from a subsidiary of EHG on or about September 29, 1972.

32. As part of this transaction, McAlpin caused the Capital Growth companies to resell to Ariel Gutierrez the 200,000 shares of the common stock of EHG which it had acquired in the 1969 transaction (as more particularly described in paragraphs 21-24, supra.). The price to Ariel Gutierrez was \$1,300,000, which amount was loaned to Gutierrez by BCB. However, the Capital Growth companies received only \$1,000,000. McAlpin has refused to testify concerning the whereabouts of the missing \$300,000. Two sets of documents were prepared in connection with the repurchase; one reflecting payment by Ariel Gutierrez of \$1,300,000 and the other reflecting payment by Ariel Gutierrez of \$1,000,000. The latter set of documents was delivered to the independent auditors of the Capital Growth companies in an attempt to conceal the misappropriation. The transaction was effected through an intermediary, thereby facilitating the concealment of the true sales price and real parties in in erest.

THE TRANSCARIBBEAN TRANSACTION AND THE MISSING \$20,000

33. On December 12, 1969, Transcaribbean Real Estate
Properties, Inc. ("Transcaribbean"), a wholly-owned subsidiary
of the Real Estate Fund, acquired a 50% interest in four parcels
of undeveloped land in Puerto Rico from Condotel, Inc., a subsidiary of EHG. In connection with said acquisition, Capital
Growth Management Company Limited, a majority-owned subsidiary
of New Providence, received a commission of \$180,000 from the Real
Estate Fund.

- 34. On August 1, 1971, the Real Estate Fund sold all the issued and outstanding shares of Transcaribbean back to Condotel, Inc. (now renamed Golden Beach Apartments Corporation ("Golden Beach")) for \$1,600,000, receiving four notes of Golden Beach with due dates extending from December 31, 1971 to December 31, 1974.
- 35. Pursuant to an agreement dated February 25, 1972, the due dates of each of the aforesaid notes of Golden Beach were extended for one year by the Capital Growth companies for a consideration of \$20,000, which has not been received by the Capital Growth companies.

THE UNWARRANTED PAYMENT OF FEES AND CANCELLATION OF DEBT

- 36. During the two-year period ended September 30, 1972, the Capital Growth companies executed \$247,000,000 of transactions involving marketable securities, the net result of which reduced the companies' portfolio of marketable securities from \$25,400,000 on September 30, 1970, to \$5,300,000 on September 30, 1971, to \$3,875,000 on September 30, 1972. During the same two-year period, the Capital Growth companies paid commissions and fees to New Providence of approximately \$3,800,000, including securities handling fees of approximately \$1,100,000. Brokerage commissions on the aforesaid \$247,000,000 transactions approximated \$1,700,000.
- 37. Notwithstanding the aforesaid payments of \$3,800,000 by the Capital Growth companies to New Providence, McAlpin caused the Capital Growth companies to cancel \$3,100,000 of debt which had been concomitantly incurred by New Providence and owed to the Capital Growth companies.

- 38. In April 1971, Shultes formed Sheffield, and McAlpin caused Sheffield to be hired by New Providence as investment adviser to New Providence with respect to the investment and reinvestment of the assets of the Capital Growth companies.
- 39. Shultes had no prior experience in the field of analysis of investment securities, and neither Shultes nor Sheffield has ever registered with the Commission in any capacity.
- 40. On or about April 16, 1971, Shultes caused Sheffield to enter into an agreement with New Providence whereby Sheffield would be paid advisory fees at the rate of 1/4 of 1% of the average total assets of the Capital Growth companies, and at the same time, entered into a written contract with McAlpin which provided that Sheffield would be paid at the rate of 1/2 of 1% of the average total assets.
- 41. As a condition to the employment of Sheffield,
 Shultes was required to rebate the difference between the fees
 as set forth in the written contract, and the fees actually agreed
 upon. As a further condition to Sheffield's retention, Shultes
 agreed that Sheffield would "pick up some expenses of the management company."
- 42. From May 17, 1971 to June 1, 1973, approximately \$137,000 was paid by Shultes and Sheffield pursuant to the aforesaid rebate arrangement.

SUPPRESSION OF THE INDEPENDENT AUDIT

43. Financial Statements with an Accountants' Report
Thereon were prepared for the Capital Growth companies and New
Providence for the years ended September 30, 1971 and 1972 by

Peat, Marwick, Mitchell and Co., the independent auditors for those companies. The Accountants' Report contains a Disclaimer of Opinion. Said Financial Statements and Report were presented by said auditors to McAlpin, Shultes, New Providence and others at various times, and discussed at meetings in New York City in or about July 1973.

- . 44. McAlpin rejected said Financial Statements and Report.
- 45. Shultes advised that said Financial Statements and Report be rejected.
- 46. McAlpin, New Providence and others thereafter retained other auditors.
- 47. McAlpin, New Providence, Shultes and others have suppressed and concealed said Financial Statements and Report from among others, the shareholders of the Capital Growth companies.
- 48. In addition to the above detailed transactions, other non-arms-length transactions between the Capital Growth companies and entities and persons affiliated with them have occurred to the detriment of the public shareholders of the Capital Growth companies. One such transaction between the Capital Growth companies and San Cristobal resulted in the payment of among other fees, a commission of \$348,000 to Capital Growth Management Company Limited as well as a finders' fee of \$50,000 to Alvarez. Certain of the facts and circumstances concerning this transaction and others are now unknown, as among other things, defendant McAlpin has refused to appear, voluntarily or otherwise, and testify in the Commission's investigation.

49. By reason of the matters described in paragraphs 12 through 48, defendants Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez and Enrique H. Gutierrez have violated, aided and abetted violations of, and are continuing to violate and aid and abet violations of, Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.

PRAYER FOR RELIEF

WHEREFORE plaintiff Commission respectfully prays and demands:

I. A preliminary and permanent injunction enjoining and restraining defendants Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez and Enrique H. Gutierrez, their officers, directors, nominees, agents, servants, employees, attorneys, successors, assigns, depositories, banks and those persons acting in active concert or participation with them, from directly or indirectly, in connection with the purchase or sale of any security, by the use of the means and instrumentalities of interstate commerce or of the mails, engaging in further acts and practices or courses of conduct in violation of Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5;

- II. An order appointing a temporary and permanent receiver for the defendants, Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama) and the voting securities of defendant New Providence Securities, Ltd., S.A. owned or controlled by defendant Clovis W. McAlpin, and any of the other defendants, said receiver to:
 - (i) take possession and control of the books, records, assets and property of defendants, Capital Growth Company, S.A., (Costa Rica) and Capital Growth Company, S.A. (Panama), wherever located;
 - (ii) take possession and control of all assets of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama) wrongfully received or otherwise misappropriated by New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez and Enrique H. Gutierrez in whatever form said assets may presently appear;
 - (iii) take possession and control of all of the voting securities of Capital Growth Company, S.A. (Costa Rica) owned or controlled by defendant New Providence Securities, Ltd., S.A. and any of the other defendants, the voting securities of Capital Growth Company, S.A. (Panama) held by defendant Capital Growth Company, S.A. (Costa Rica), and the voting securities of defendant New Providence Securities, Ltd., S.A. owned or controlled by defendant Clovis W. McAlpin and any of the other defendants herein:

- Growth Company, S.A. (Costa Rica) and Capital
 Growth Company, S.A. (Panama) and New Providence
 Securities, Ltd., S.A. and report thereon to the
 Court and those interested in said defendants;
- (v) seek disgorgement and an accounting from defendants New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez and Enrique H. Gutierrez of all misappropriated monies, securities and assets of the Capital Growth companies; and
- (vi) act in the capacity of an equity receiver as appropriate in the circumstances;
- Securities, Ltd., S.A., Clovis W. McAlpin, and the other defendants to assign, transfer and deliver to said receiver appointed herein all of the voting securities of Capital Growth Company, S.A. (Costa Rica) owned or controlled by them, and ordering defendant Clovis W. McAlpin and the other defendants herein to assign, transfer and deliver to said receiver all of the voting securities of New Providence Securities, Ltd., S.A., owned or controlled by them, and ordering defendant Clovis W. McAlpin, in his individual capacity as a trustee, and in any other capacity, to designate said receiver as his proxy with regard to any and all shares of New Providence Securities, Ltd., S.A. as to which defendant McAlpin has voting rights or authority;

IV. A preliminary and permanent injunction enjining ard restraining defendants Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez and Enrique H. Gutierrez, their officers, directors, nominees, agents, servants, employees, attorneys, successors, assigns, depositories, banks and those other persons acting in active concert or participation with them from, directly or indirectly, expending, dissipating, reducing, encumbering, investing, transferring, or otherwise disposing of and exercising any control over the present and future assets of the Capital Growth companies in whatever form those assets appear, and any income arising from the use of those assets, whether or not said assets or income are in the possession of said persons;

V. Such other and further relief as this Court may deem just and appropriate and such other equitable relief as may be necessary or appropriate to render effective such injunctions, or receiverships, or to prevent the continuation or repetition of such violations and unlawful acts, practices and courses of conduct as are hereinabove alleged, or similar violations, acts, practices and courses of conduct.

STANLEY SPORKIN Director

RICHARD L. JAEGER Chief Counsel

THEODORE ALTMAN Assistant Director

Securities and Exchange Commission Division of Enforcement Washington D. C. 20549

Dated: New York, New York August 30, 1974

Respectfully (submitted. Cila. WILLIAM D. MORAN .

Regional Administrator

MARVIN E. JACOB

Associate Regional Administrator

MERYL E. WIENER

Attorney

Securities and Exchange Commission New York Regional Office 26 Federal Plaza New York, New York 10007

20A

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

**

74 Civil Action File No. 2277

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. McALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ,

ORDER TO SHOW
CAUSE AND
TEMPORARY RESTRAINING ORDER

Defendants.

Upon the annexed affidavits of Marvin E. Jacob and Jerald A. Lanzotti, and upon the complaint in this action, and it appearing that pending final determination of this application, the defendants will, unless enjoined, continue to engage in acts and practices that misuse the monies and properties of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama), all to the immediate and irreparable harm of the investing public, it is hereby

DRDERED that the above-captioned defendants show cause before a Judge of this Court at 1000 o'clock 4.m. on 1974 at Room 128, United States Court House, Foley Square, County, City and State of New York, or as soon thereafter as counsel can be heard, why:

a preliminary injunction should not be issued
 pursuant to Rule 65 of the Federal Rules of Civil Procedure
 enjoining and restraining Capital Growth Company, S.A. (Costa Rica),

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Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez, and Enrique H. Gutierrez, their officers. directors, nominees, agents, servants, employees, attorneys, successors, assigns, depositories, banks and those other persons acting in active concert or participation with them from, (i) directly or indirectly, expending, dissipating, reducing, encumbering, investing, transferring, or otherwise disposing of or exercising any control over the present and future assets of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama), in whatever form said assets appear and (ii) directly or indirectly, in connection with the purchase or sale of any security, by the use of the means and instrumentalities of interstate commerce or of the mails, engaging in further acts and practices and courses of conduct in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and Rule 10b-5 thereunder, 17 CFR 240.10b-5;

- 2. An Order should not be entered appointing a receiver, pending the final hearing and determination of this action, for the defendants Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama) and the voting securities of defendant New Providence Securities, Ltd., S.A., owned or controlled by defendant Clovis W. McAlpin, and any of the other defendants, said receiver to:
 - (i) take possession and control of the books, records, assets and properties of defendants, Capital Growth Company, S.A., (Costa Rica) and Capital Growth Company, S.A. (Panama), wherever located;

- Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama) wrongfully received or otherwise misappropriated by New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez and Enrique H. Gutierrez in whatever form said assets may presently appear;
- (iii) take possession and control of all of the voting securities of Capital Growth Company, S.A. (Costa Rica) owned or controlled by defendant New Providence Securities, Ltd., S.A. and any of the other defendants, the voting securities of Capital Growth Company, S.A. (Panama) held by defendant Capital Growth Company, S.A. (Costa Rica), and the voting securities of defendant New Providence Securities, Ltd., S.A. owned or controlled by defendant Clovis W. McAlpin and any of the other defendants herein;
- (iv) ascertain the true state of affairs of Capital
 Growth Company, S.A. (Costa Rica) and Capital
 Growth Company, S.A. (Panama) and New Providence
 Securities, Ltd., S.A. and report thereon to the
 Court and those interested in said defendants;
- (v) seek disgorgement and an accounting from defendants New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield

Advisory Company, S.A., EHG Enterprises, Inc.,
Clovis W. McAlpin, Sanford C. Shultes, Ariel E.
Gutierrez and Enrique H. Gutierrez of all misappropriated monies, securities and assets of the
Capital Growth companies; and

- (vi) act in the capacity of an equity receiver as appropriate in the circumstances;
- 3. An Order should not be entered requiring defendants
 New Providence Securities, Ltd., S.A., Clovis W. McAlpin and
 the other defendants to assign, transfer and deliver to said
 receiver appointed herein all of the voting securities of Capital
 Growth Company, S.A. (Costa Rica) owned or controlled by them,
 and ordering defendant Clovis W. McAlpin, in his individual
 capacity as a trustee, and in any other capacity, to designate
 said receiver as his proxy with regard to any and all shares of
 New Providence Securities, Ltd., S.A. as to which defendant
 McAlpin has voting rights or authority; and
- 4. Such other and further relief as this Court may deem just and appropriate or such other equitable relief as may be necessary or appropriate to render effective such injunctions, or receiverships, or to prevent the continuation or repetition of such violations and unlawful acts, practices, and courses of conduct as are hereinabove alleged, or similar violations, acts, practices and courses of conduct, should not be granted; and it appearing that it is necessary and appropriate in the public interest to preserve the status quo pending hearing on the Commission's application for a preliminary injunction and other relief, it is further

ORDERED that, pending the hearing of this application for a preliminary injunction and other relief, defendants Capital

Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company S.A., EHG Enterprises, Inc. Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez a Enrique H. Gutierrez, their officers, directors, nominees, agents, servants, employees, attorneys, successors, assigns, depositories, banks and those other persons acting in active concert or participation with them, are hereby enjoined and restrained from (i) directly or indirectly, expending, dissipating, reducing, encumbering, investing, transferring, or otherwise disposing of any of the present and future assets of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama), in whatever form said assets now appear, and the voting securities of Capital Growth Company, S.A. (Costa Rica) and New Providence Securities, Ltd., S.A., and (ii) directly or indirectly, in connection with the purchase or sale of any security, by the use of the means and instrumentalities of interstate commerce or of the mails, engaging in further acts and practices or courses of conduct in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and Rule 10b-5 thereunder, 17 CFR 240.10b-5, and it is further

ORDERED that service of duly conformed copies of this
Order to Show Cause and Temporary Restraining Order and the
papers upon which it is granted be made in the following manner:

- 1. Upon Clovis W. McAlpin by Registered Mail, via
 Air Mail (such service to be complete upon mailing), a copy to
 his mailing address at P. O. Box 7-1460, San Jose, Costa Rica,
 and in addition, by telephoning McAlpin in Costa Rica at 227-720
 and advising him of the substance of this Order and the fact of
 its entry.
- Upon Capital Growth Company, S.A., (Costa Rica),
 Capital Growth Company S.A. (Panama) and New Providence

Securities Ltd., S.A. by Registered Mail, via Air Mail, (such service to be complete upon mailing), a copy to their mailing address at P. O. Box 7-1460, San Jose, Costa Rica and a copy to the mailing address of Clovis W. McAlpin, which is the same mailing address as that of those entities, and in addition, by telephoning McAlpin in Costa Rica at 227-720 and advising him of the substance of this Order and the fact of its entry.

- 3. Upon Sanford C. Shultes by delivering a copy to his attorneys, Lunney and Crocco, Esqs., to the attention of J. Robert Lunney, Esq., at their offices at 20 Exchange Place, New York, New York, and in addition, by Certified Mail, Return Receipt Requested, (such service to be complete upon mailing), to his last known residence at 439 East 51st Street, New York, New York.
- 4. Upon Sheffield Advisory Company and Sheffield Advisory Company S.A. by delivering a copy to their attorneys, Lunney and Crocco, Esqs., to the attention of J. Robert Lunney, Esq., at their offices at 20 Exchange Place, New York, New York, and in addition, by Certified Mail, Return Receipt Requested, (such service to be complete upon mailing) to the last known offices of said entities at 11 Broadway, New York, New York.
- 5. Upon Ariel E. Gutierrez, Enrique H. Gutierrez and EHG Enterprises, Inc. by delivering a copy to their attorneys, Stroock & Stroock & Lavan, Esqs., to the attention of Laurence Greenwald, Esq., at their offices at 61 Broadway, New York, New York, and in addition by Certified Mail, Return Receipt Requested, (such service to be complete upon mailing), to the offices of EHG Enterprises, Inc., at El Caribe Building, corner of Palmeras and Jeronimo, San Juan, Puerto Rico, and sufficient cause appearing, it is further

order and the papers upon which it is granted, be served upon the above named defendants by Lept. 4 1974, at 5 o'clock p.m., and it is further

ORDERED that service of this Order, and the Summons, Complaint, Affidavits and Memorandum herein may be made by any employee or agent of the United States government.

5/ Charles C. Stowart, fr.

Dated: New York, New York September 3, 1974 Issued at 52 p.m. UNITED STATES DISTRI I COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

74 Civil Action File No. 3777 (CO)

v.

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. MCALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ,

AFFIDAVIT OF MARVIN E. JACOB IN SUPPORT OF ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

:

Defendants.

COUNTY OF NEW YORK)
) ss
STATE OF NEW YORK)

MARVIN E. JACOB, being duly sworn, deposes and says:

- 1. I Am an attorney employed by the plaintiff Securities and Exchange Commission ("Commission") and submit this affidavit in support of the Order to Show Cause bringing on the annexed application of the Commission and the Temporary Restraining Order contained therein.
- 2. The matters to be determined by the application of the Commission require expeditious consideration as they affect the interests of public investors. In view of the serious and immediate danger to public shareholders as set forth in the affidavit of Jerald A. Lanzotti ("Lanzotti affidavit") annexed to the plaintiff's application and in the complaint, it is imperative that this proceeding be commenced by Order to

Show Cause addressed to the defendants returnable at the earliest convenience of the Court.

- 3. The non-arms-length transactions, missing monies, diversions of assets, unwarranted cancellations of debt, concealment of material facts from shareholders, and continued control of the Capital Growth companies by the alleged wrongdoers as set forth in the Lanzotti affidavit, demonstrates, among other things, the substantial and continuing injury to shareholders of the Capital Growth companies. It is thus essential that a temporary restraining order be issued to preserve the status quo, pending hearing of the application for a preliminary injunction, particularly in view of the already depleted assets of the Capital Growth companies.
- 4. Unless the Commission's application for a Temporary Restraining Order is granted, a substantial likelihood that the interests of said public investors, and the rights of the receiver sought by the Commission, will be adversely and irreparably affected, as steps may be taken by defendants which would be highly prejudicial to them. Certain of the assets of the Capital Growth companies are now located in at least two United States banks and in foreign branches of other United States banks, and in a brokerage firm in New York City. In addition, certain wholly owned subsidiaries of the Capital Growth companies are joint venturers with EHG in various real estate investments in the United States. The Temporary Restraining Order sought by the Commission would, however, assure preservation of the status quo pending at least the hearing on the Commission's motion, and would clearly not result in irreparable harm to any adverse party even if the Commission's motion is ultimately, not granted.

MARVIN E. JACOB

Sworn to before me this

BARBARA IL SIESTO

Bebuy Public, State of New York

No. 45 FG.:662

OTARY PUBLIC

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

74 Civil Action File No. 277 (ccs)

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. MCALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ,

AFFIDAVIT OF
MARVIN E. JACOB
IN SUPPORT OF
MANNER OF SERVICE
OF THE ORDER TO
SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

Defendants.

COUNTY OF NEW YORK)
) ss:
STATE OF NEW YORK)

MARVIN E. JACOB, being duly sworn, deposes and says:

- I am an attorney employed by the plaintiff Securities and Exchange Commission ("Commission").
- 2. I submit this affidavit in support of the request that service of duly conformed copies of the Order to Show Cause and Temporary Restraining Order herein and the papers upon which it is granted be made in the following manner:
- a. Upon Clovis W. McAlpin by Registered Mail, via Air Mail (such service to be complete upon mailing), a copy to his mailing address at P. O. Box 7-1460, San Jose, Costa Rica, and in addition, by telephoning McAlpin in Costa Rica at 227-720 and advising him of the substance of this Order and the fact of its entry.
- b. Upon Capital Growth Company, S.A., (Costa Rica),
 Capital Growth Company S.A. (Panama) and New Providence

Securities Ltd., S.A. by Registered Mail, via Air Mail, (such service to be complete upon mailing), a copy to their mailing address at P. O. Box 7-1460, San Jose, Costa Rica and a copy to the mailing address of Clovis W. McAlpin, which is the same mailing address as that of those entities, and in addition, by telephoning McAlpin in Costa Rica at 227-720 and advising him of the substance of this Order and the fact of its entry.

- c. Upon Sanford C. Shultes by delivering a copy to his attorneys, Lunney and Crocco, Esqs., to the attention of J. Robert Lunney, Esq., at their offices at 20 Exchange Place, New York, New York, and in addition, by Certified Mail, Return Receipt Requested, (such service to be complete upon mailing), to his last known residence at 439 East 51st Street, New York, New York.
- d. Upon Sheffield Advisory Company and Sheffield
 Advisory Company S.A. by delivering a copy to their attorneys,
 Lunney and Crocco, Esqs., to the attention of J. Robert Lunney,
 Esq., at their offices at 20 Exchange Place, New York, New York,
 and in addition, by Certified Mail, Return Receipt Requested,
 (such service to be complete upon mailing), to the last known
 offices of said entities at 11 Broadway, New York, New York.
- e. Upon Ariel E. Gutierrez, Enrique H. Gutierrez and EHG Enterprises, Inc. by delivering a copy to their attorneys, Stroock & Stroock & Lavan, Esqs., to the attention of Laurence Greenwald, Esq., at their offices at 61 Broadway, New York, New York, and in addition by Certified Mail, Return Receipt Requested, (such service to be complete upon mailing) to the offices of EHG Enterprises, Inc., at El Caribe Building, corner of Palmeras and Jeronimo, San Juan, Puerto Rico.
- 3. The method of service outlined in the Order to
 Show Cause and Temporary Restraining Order will provide adequate
 notice to the parties named in the Order and is reasonable
 under the circumstances.

- 4. The defendant Clovis W. McAlpin has stated in investigative testimony that P. O. Box 7-1460, San Jose, Costa Rica is his mailing address and that of Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama) and New Providence Securities, Ltd., S.A. To date, no attorney has appeared on their behalf. In addition, telephonic notice will also be given.
- 5. The defendant Sanford C. Shultes testified in the Commission's investigation that J. Robert Lunney, Esq., of Lunney & Crocco, Esqs., with offices at 20 Exchange Place, New York, New York, was his attorney. The whereabouts of Shultes are not now known to us. It is thus believed that the suggested manner of service by delivering copies to those offices and to the last known residence of Shultes would provide adequate notice to him.
- 6. Similarly, Shultes investigative testimony discloses that 11 Broadway, New York, New York is the last known business address of Sheffield Advisory Company and Sheffield Advisory Company, S.A., and that J. Robert Lunney, Esq. of Lunney & Crocco, Esqs., appeared as attorneys on behalf of those entities. Accordingly, the suggested manner of service with respect to them would provide adequate notice to them.
- 7. The defendants, Ariel E. Gutierrez and Enrique H. Gutierrez each appeared in the Commission's investigation. The testimony discloses that Laurence Greenwald, Esq., of Stroock & Stroock & Lavan, Esqs., 61 Broadway, New York, is York, was their attorney, and the attorney for EHG Enterprises, Inc., and it is thus believed that service of the Order to Show Cause and the supporting papers by delivering a copy to their offices, would provide adequate notice to them. In addition, copies are being mailed to the offices of EHG Enterprises, Inc.

No previous application for this relief has been made by the Commission.

wherefore, plaintiff respectfully requests that plaintiff's method of service as set forth in the Order to Show Cause and Temporary Restraining Order be approved by the Court.

MARVIN E. JACOB

Sworn to before me this day of August 1974

NOTARY PUBLIC

BARBARA E. SIESTO
Motory Public, State of New York
No. 36-3662662
Quelified in Orange County
Commission Expires March 30, 197.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. MCALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ,

74 Civil Action File No. 3727(57)

AFFIDAVIT

:

Defendants.

COUNTY OF NEW YORK)
STATE OF NEW YORK)

JERALD A. LANZOTTI, being duly sworn, deposes and says:

- I am employed by the plaintiff Securities and Exchange Commission ("Commission") as Chief, Branch of Investment Company Inspections, in its New York Regional Office.
- 2. I make this affidavit upon information and belief in support of the Commission's application for a preliminary injunction and the appointment of a temporary receiver, and a temporary restraining order pending hearing on said application.
- 3. The sources of my information and the bases of my belief are documents and testimony obtained by the Commission

during the course of its investigation in this matter, including the several affidavits and documents annexed as Exhibit "A-J".

- 4. This case involves the now not unfamiliar tale of the despoilation of the assets of an offshore investment company, defendant Capital Growth Company, J.A., (Costa Rica) 1/ by management and its confederates through a series of self-dealing and fraudulent transactions. As of December 31, 1968, the net assets of the Capital Growth companies consisted largely of marketable securities having a value of \$78,000,000. Current information indicates net assets of approximately \$14,200,000 representing largely illiquid investments in closely-held and newly-formed companies.
- 5. As more fully described hereinafter, shareholders' rights have been completely ignored and the most significant steps in the affairs of the Capital Growth companies have been taken without any prior notice to or approval of shareholders.
- 6. The conversions, misappropriations of assets and the fraudulent acts and practice implained of by the Commission as more particularly described hereinafter and in the complaint, have had a substantial impact on the United States in general and on its securities markets in particular.
- and sold to public investors under representations that the underlying investments of the Capital Growth companies would be primarily in United States securities, the Boards of Directors of the managements of said companies would be primarily composed of executives within the United States and that the assets of said companies would be invested with the assistance of Investment Advisers registered with the Securities and Exchange Commission of the United States.

Unless otherwise indicated, defendants Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama) and the other Capital Growth entities described hereinafter will be referred to collectively as the Capital Growth companies.

- 8. In addition, the er-all scheme directed by McAlpin and the other deferrants was carried out through extensive use of United States broker-dealers, securities exchanges, investment advisers, banks, the mails and other jurisdictional means.
- 9. Furthermore, there are United States citizens who are shareholders of the Capital Growth companies as shown by the affidavits annexed hereto as exhibits "A-D".
- 10. The acts and transactions constituting the violations of law complained of occurred, among other places, within the Southern District of New York.
- 11. The defendants as more particularly described in paragraphs 5 through 11 of the complaint one Capital Growth Company, S. A. (Costa Rica), Capital Growth Company, S.A. (Panama), ("the Capital Growth companies"), New Providence Securities, Ltd., S. A. ("New Providence"), Sheffield Advisory Company, Sheffield Advisory Company, S.A., ("Sheffield"), EHG Enterprises, Inc. ("EHG"), Clovis W. McAlpin ("McAlpin"), Sanford C. Shultes ("Shultes"), Enrique H. Gutierrez and Ariel E. Gutierrez.

REPRESENTATIONS IN PROSPECTUSES

12. From in or about 1965, and continuing until at least June 1971, the Capital Growth companies, New Providence and its predecessors, McAlpin and others offered and sold redeemable securities of the Capital Growth companies pursuant to prospectuses which stated, among other things, the following, and statements of similar import and effect:

"Capital Growth Fund invests primarily in shares of companies selected for their growth potential and from time to time, in United States Government Bonds. Each of the companies represents leading corporations within growth industries.

"Capital Growth Fund is one of the few mutual funds operating outside of the United States whose underlying investments are primarily in United States securities, whose Management Company has a Board of Directors primarily composed of executives within the United States.

"Capital Growth Fund's investments are primarily in companies of large growth potential with emphasis on United States industry. Selected investments will be made in other areas of rapid economic growth and financial and political stability.

"The Fund's assets are invested with the assistance of investment advisors who are registered with the Securities and Exchange Commission of the United States. The portfolios they manage are wholly owned by Capital Growth Fund. These portfolios are separated for evaluation, accounting, comparison and audit. The accounts of all of the portfolios appear in a consolidated statement audited by Price Waterhouse and Co. and do not appear as individual investments.

"Each investment advisor is under contract with the management company and is independent of the others. While the advisors are selected on the basis of their proven ability in the investment of money, the depth of their research, and their aggressive attitude in the use of capital, their one-year contract is renewable only on satisfactory performance of their portfolio.

"Arawak Trust Company, Limited is the Trustee of Capital Growth Fund and is responsible for all transactions effected for the Fund. This independent trust company, a Bahamian corporation, was formed by a number of independent banks.

"The Sponsor [a subsidiary of the Management Company] will liquidate the shares in the Planholder's account at 100% of the net asset value at the time instructions are received."

CLOSE-ENDING OF THE CAPITAL GROWTH COMPANIES AND ELIMINATION OF THE INDEPENDENT TRUSTEE

- 13. Until in our about May 1971, the Capital Growth companies had operated pursuant to provisions set forth in a Trust Deed, between New Providence and Arawak Trust Company, Ltd. ("Arawak"), a copy of which is annexed hereto as Exhibit "E".
- 14. Commencing in or about September 1968 and continuing to the present, McAlpin, the Capital Growth companies, New Providence and its predecessors, and at various times the other defendants and other persons, have been converting and misappropriating the assets of the Capital Growth companies to their own benefit and to the detriment of shareholders. This course of conduct consisted of a series of self-dealing transactions, including the elimination of the independent trustee, the close-ending of the Capital Growth companies, and the diversion of the marketable assets of said companies into closely-held, newly-formed entities owned or controlled by certain of the defendants and persons associated with them.
- 15. As a result of disputes concerning the propriety of investments and the prospective investments by the Capital Growth companies, Arawak, the then independent trustee of the Capital Growth companies whose responsibilities included protection of the trust property, protested and took steps to terminate itself as trustee and seek the appointment of a successor. In this connection there is annexed hereto as Exhibit "F" the affidavit of Ralph D. Seligman, Arawak's counsel.
- 16. McAlpin, New Providence and others used this opportunity to eliminate the vital office of independent trustee through the sham appointment of Sion Plaza, S.A. ("Sion") on or about May 3, 1971, which was also removed shortly thereafter as a prelude to the close-ending of the Capital Growth companies. As

shown by Exhibit "G" annexed hereto, the appointment of Sion was accomplished through the intervention and assistance of Jose Figueres ("Figueres"), the then president of Costa Rica. McAlpin was introduced to Figueres by Dr. Alberto Inocente Alvarez ("Alvarez"), the uncle of the Gutierrez brothers.

- 17. Two weeks after its appointment, Sion was removed, and shortly thereafter McAlpin, New Providence and others unilaterally and without prior notice to or approval of shareholders close-ended the Capital Growth companies, thereby extinguishing the shareholders' right to redeem.
- sequent elimination of Sion as trustee, was effected without prior notice to or approval of the shareholders, and deprived shareholders of the vital protections afforded by an independent fiduciary obligated to disburse funds and release securities and other assets only in accordance with a trust agreement.
- 19. Voting control in the newly close-ended companies was placed in a new class of common stock issued to New Providence for consideration of a mere \$100.
- 20. In or about May 1971, Capital Growth Real Estate
 Fund ("the Real Estate Fund") was also close-ended and shortly
 thereafter, on or about August 12, 1971, was merged into Capital
 Growth Company, S.A. on the ba is of 2.5 shares of the latter for
 each share of the former, again without any prior notice to or
 approval of the shareholders of either company.
- 21. The merger was grossly unfair to the shareholders of Capital Growth Company, S.A., as the net asset value used on the conversion was \$11.22 per share of the Real Estate Fund, which

was substantially in excess of the true value which, if used, would have yielded to the Real Estate Fund shareholders fewer shares of Capital Growth Company, S.A. (Costa Rica).

THE SAN CRISTOBAL TRANSACTION

- 22. With an eye to establishing a haven in Costa Rica,
 McAlpin, New Providence and others on or about September 30, 1968,
 caused the Capital Growth companies to invest \$2 million in cash
 in a newly-formed Costa Rican shell corporation, Sociedad Agricola
 Industrial San Cristobal, S. A. ("San Cristobal"), whose shares
 were not publicly traded. For its investment, the Capital
 Growth companies received fifty percent of the common shares of
 San Cristobal for a total equity interest of forty percent.
- of the same name (Sociedad Agricola Industrial San Cristobal, Ltd.) owned and controlled by the family of Jose Figueres, who was at the time the former president of Costa Rica and a candidate for re-election to that office, contributed to San Cristobal its net assets having a negative book value of \$157,000 which were recorded on the books of the new corporation at \$3,000,000. For its contribution, it received the remaining fifty percent of the common shares and all of the preferred shares, for a controlling equity interest of sixty percent.
 - 24. Alvarez is a director of San Cristobal and an adviser of Figueres. Alvarez approached McAlpin regarding the possible investment by McAlpin in San Cristobal.
 - 25. The investment of the Capital Growth companies departed from the kinds of investments previously made by said companies in publicly-traded securities, and was contrary to the representations and restrictions contained in among other things, the prospectuses of said companies.

- 26. Thereafter, in or about July 1972, concurrent with an investment in San Cristobal of \$2,150,000 by IIT, an International Investment Trust ("IIT"), a mutual fund controlled by Robert L. Vesco ("Vesco") and others, the Capital Growth companies resold 500,000 of their shares to San Cristobal for a \$500,000 unsecured promissory note not payable until July 1977. IIT received a 7% unsecured promissory note due July 30, 1977 in the amount of their investment and warrants to purchase 500,000 shares of the common stock of San Cristobal at various price ranges commencing at a minimum of \$1.00 per share.
- 27. Interest payments on the \$500,000 note held by the Capital Growth companies were due annually commencing in July 1973. Those in control of San Cristobal have failed to publish adequate and accurate financial information on San Cristobal.

THE ENG TRANSACTION AND THE MISSING \$300,000

- 28. In or about September 1969, McAlp. 1, New Providence and others caused the Capital Growth companies to acquire 23% of the equity of EHG, represented by 200,000 shares of its common stock, for \$2,005,000 in cash. As of the date of the purchase, the Capital Growth companies paid approximately \$1,400,000 in excess of their equity interest in EHG.
- 29. Of the \$2,005,000 received by EHG on the transaction, at least \$900,000 was contemporaneously disbursed by EHG in the following manner: \$400,000 as a loan to New Providence; \$100,000 as a "brokerage commission" to New Providence; and \$400,000 for the purchase of the bonds of the National Liberation Party of Costa Rica. In addition, EHG transferred 10,000 of its

shares to Alvarez, the uncle of the Gutierrez brothers, who first introduced them to McAlpin.

- 30. The investment of the Capital Growth companies in EHG was another departure from the kinds of investments previously made by said companies in publicly traded securities, and was contrary to the representations and restrictions contained in, among other things, the prospectuses of said companies.
- 31. As part of this transaction, on or about September 28, 1972, Vesco and others caused IIT to purchase from EHG for \$9,500,000, an equivalent amount of subordinated debentures of the company's subsidiary due September 1987 (with warrants to buy common stock of EHG). At the same time, Vesco and others caused Venture Fund (International), N.V., another mutual fund owned by them, to purchase from EHG for \$2,500,000, 250,000 shares of the company's newly-created class of cumulative convertible preferred stock. For three months prior to the financing engineered by Vesco and his group, EHG had attempted unsuccessfully through Hornblower & Weeks-Hemphill Noyes, Incorporated, to place \$6,000,000 of 15 year notes with warrants to purchase common stock of the company. At the end of August 1972, Alvarez, a director and shareholder of EHG as well as a Costa Rican resident who was aiding Vesco and his group in their efforts to relocate in Costa Rica, introduced them to Enrique and Ariel Gutierrez for the purpose of arranging financing. Although EHG was seeking only \$6,000,000 in financing, Vesco and his group proposed at a meeting on August 31, 1972 that EHG accept \$12,000,000 instead.

EHG accepted the proposal, and upon receiving the proceeds of the financing on or about September 28, 1972, pursuant to prior arrangement, deposited \$6,000,000 with the Bahamas Commonwealth Bank, Ltd., a Vesco-controlled bank, in return for a negotiable certificate of deposit, not withdrawable for six months, bearing 4% interest per annum. In connection with this transaction, Alvarez received a finder's fee of \$290,000 from a subsidiary of ERG on or about September 29, 1972.

32. McAlpin caused the Capital Growth companies to resell to Ariel Gutierrez the 200,000 shares of the common stock of EHG which it had acquired in the 1969 transaction. The price to Ariel Gutierrez was \$1,300,000 which amount was loaned to Gutierrez by the Bahamas Commonwealth Bank, Ltd., pursuant to the commitment made by Vesco at the August 31, 1972 meeting. The Capital Growth companies received only \$1,000,000. McAlpin has refused to testify concerning the whereabouts of the missing \$300,000. Two sets of documents were prepared in connection with the repurchase; one reflecting payment by Ariel Gutierrez of \$1,300,000 and the other reflecting payment by Ariel Gutierrez of \$1,000,000. Those documents are annexed hereto as Exhibit "H". The latter set of documents were delivered to the independent auditors of the Capital Growth companies in an attempt to conceal the misappropriation. The transaction was effected through an intermediary, thereby facilitating the concealment of the true sales price and the real parties in interest.

THE TRANSCARIBBEAN TRANSACTION AND THE MISSING \$20,000

33. On December 12, 1969, Transcaribbean Real Fstate
Properties, Inc. ("Transcaribbean"), a wholly-owned subsidiary
of the Real Estate Fund, acquired a 50% interest in four parcels

of undeveloped land in Puerto Rico from Condotel, Inc., a subsidiary of EHG. In connection with said acquisition, Capital Growth Management Company Ltd., a majority owned subsidiary of New Providence received a commission of \$180,000 from the Real Estate Fund.

- 34. On August 1, 1971, the Real Estate Fund sold all the issued and outstanding shares of Transcaribbean back to Condotel, Inc. (now renamed Golden Beach Apartments Corporation ("Golden Beach")) for \$1,600,000, receiving four notes of Golden Beach with due dates extending from December 31, 1971 to December 31, 1974.
- 35. Pursuant to an agreement dated February 25, 1972, the due dates of each of the aforesaid notes of Golden Beach were extended for one year by the Capital Growth companies for a consideration of \$20,000, which has not been received by the Capital Growth companies.
- 36. During the three year period in which the Capital Growth companies owned approximately 23% of the shares of EHG, the Capital Growth companies and their wholly-owned subsidiaries entered into various real estate transactions with EHG and its subsidiaries. The net effect of these transactions, among other things, was to convert approximately \$1,130,000 of cash of the Capital Growth companies into notes of subsidiaries of EHG, at times when EHG was pressed for cash.

THE SANTA ELENA TRANSACTION - A FEE FOR ALL

37. On or about September 30, 1970, the Real Estate Fund purchased all the shares of Hacienda Cafetalera Santa Elena Ltda. ("Santa Elena"), (which had a net book value of \$976,149)

from San Cristobal for \$3,950,000 debentures of the Real Estate Fund. (The Capital Growth companies had at that time a 40% equity interest in San Cristobal.) Through a series of machinations, the Capital Growth companies ended up paying \$2,000,000 cash for the Santa Elena shares.

- 38. Of the \$2,000,000 in cash, a \$450,000 commission fell into the hands of Sociedad Agricola Industrial y Comercial, S.A., (represented to be an unrelated company), and \$250,000 was paid to the personal ranch of McAlpin in return for an option to purchase lumber. The Real Estate Fund also paid a commission of \$348,000 to Capital Growth Management Company Limited and a finder's fee of \$50,000 to Alvarez.
- 39. In this instance, the sale of property having a book value of \$976,149 resulted in the payment of fees and commissions of approximately \$1,100,000.

THE UNWARRANTED PAYMENT OF OTHER FEES AND CONTISSIONS

40. During the two-year period ended September 30,

1972, the Capital Growth companies executed \$247,000,000 of

transactions involving marketable securities, the net result

of which reduced the companies' portfolio of marketable securi
ties from \$25,400,000 on September 30, 1970 to \$5,300,000 on

September 30, 1971, to \$3,875,000 on September 30, 1972. During

the same two-year period, the Capital Growth companies paid

commissions and fees to New Providence of approximately \$3,800,000,

including securities handling fees of approximately \$1,100,000.

Brokerage commissions on the aforesaid \$247,000,000 transactions

approximated \$1,700,000, including approximately \$1,400,000 of

commissions on securities transactions placed through an individual

who was employed at various times by different brokers during this

period.

- 41. Notwithstanding the aforesaid payments of \$3,800,000 by the Capital Growth companies to New Providence, McAlpin caused the Capital Growth companies to cancel \$3,100,000 of debt which had been concomitantly incurred by New Providence and owed to the Capital Growth companies.
- 42. In April 1971, Shultes formed Sheffield, and McAlpin caused Sheffield to be hired by New Providence as investment adviser to New Providence with respect to the investment and reinvestment of the assets of the Capital Growth companies. Shultes had no prior experience in the field of analysis of investment securities, and neither Shultes nor Sheffield has ever registered with the Commission in any capacity.
- 43. Among other things, Shultes and Sheffield issued instructions to sell the marketable securities in the portfolio of the Capital Growth companies and transfer the proceeds to Costa Rica.
- 44. On or about April 16, 1971, Shultes caused Sheffield to enter into an agreement with New Providence whereby Sheffield would be paid advisory fees at the rate of 1/4 of 1% of the average total assets of the Capital Growth companies, and at the same time, entered into a written contract with McAlpin which provided that Sheffield would be paid at the rate of 1/2 of 1% of the average total assets. Those agreements are annexed hereto as Exhibit "I".
- 45. As a condition to the employment of Sheffield,
 Shultes was required to rebate the difference between the fees
 as set forth in the written contract, and the fees actually
 agreed upon. As a further condition to Sheffield's retention,

SUPPRESSION OF THE INDEPENDENT AUDIT

- 47. Annexed hereto as Exhibit "J" are the Financial Statements With an Accountants' Report Thereon for the Capital Growth companies and New Providence, for the years ended September 30, 1971 and 1972, which were prepared by Peat, Marwick, Mitchell and Co., ("Peat Marwick") the independent auditors for those companies. The annexed Statements and k port disclose various of the matters hereinabove set forth, and contain a Disclaimer of Opinion. They were presented by said auditors to McAlpin, Shultes, New Providence and others at various times and discussed at meetings in New York City in or about July 1973.
- 48. McAlpin rejected said Financial Statements and Report; Shultes advised that they be rejected.
- 49. McAlpin, New Providence and others thereafter retained other auditors more to their liking. Their report fails to address itself to the problems that gave rise to the Disclaimer of Opinion set forth in the Peat Marwick report.
- 50. McAlpin, New Providence, Shultes and others have suppressed and concealed said Financial Statements and Report of Peat Marwick from, among others, the shareholders of the Capital Growth companies.
- 51. In addition to the above detailed transactions, other non arms-length transactions between the Capital Growth companies and entities and persons affiliated with them have

occurred, to the substantial detriment of the Capital Growth companies and their public shareholders. Certain of the facts and circumstances concerning these and other transactions are now unknown, as among other things, McAlpin has refused to appear, voluntarily or otherwise, and testify in the Commission's investigation.

- 52. Certain of the assets of the Capital Growth companies are now located in at least two United States banks and in foreign branches of other United States banks, and in a brokerage firm in New York City. In addition, certain wholly owned subsidiaries of the Capital Growth companies are joint venturers with EHG in various real estate investments in the United States.
- fendants have engaged in violations of law and breaches of trust of the most egregious nature to the substantial and possibly irreparable prejudice of the investing public. There is not the slightest indication that they have ceased or will cease to engage in those courses of conduct. Accordingly, it is clear that unless the preliminary relief sought by the Commission is granted, whatever funds might otherwise be salvaged, will continue to be dissipated to the irreparable injury of the investing public. Similarly, it is evident that the appointment of a receiver is essential to take charge of the affairs of the Capital Growth companies and the voting securities of New Providence, and to take such steps as are necessary to vindicate the rights of public investors therein.
- 54. No previous application has been made for the relief herein or for any similar relief.

JERALD A. LANZOTTI

Sworn to before me this again day of August, 1974

NOTARY PUBLIC

Motory Public, State of New York
No. 36-3662662
Qualified in Urange County
Commission Expires March 30, 1975

48A SECURITIES AND EXCHANGE COMMISSION Before: HON. CHARLES E. STEWART, JR. v. District Judge. CAPITAL GROWTH COMPANY, S.A. 14 Civ. 3779 Defendants. New York, September 3,4, 1974 /14 STENOGRAPHER'S MINUTES

1	jbesb
2	UNITED STATES DISTRICT COURT
3	SOUTHERN DISTRICT OF NEW YORK
4	x-
5	SECURITIES AND EXCHANGE COMMISSION,
6	Plaintiff,
7	vs.
8	CAPITAL GROWTH COMPANY, S.A. (Costa
9	Rica), CAPITAL GROWTH COMPANY, S.A., : (Panama), NEW PROVIDENCE SECURITIES, 74 Civ. 3779
10	LTD., S.A., SHEFFIELD ADVISORY COMPANY, : SHEFFIELD ADVISORY COMPANY, S.A.,
11	EGH ENTERPRISES, INC. (Puerto Rico), : CLOVIS W. MCALPIN, SANFORD C. SHULTES,
12	ARIEL E. GUTIERREZ - EHG, ENRIQUE H. : GUTIERREZ, EHG,
13	Defendants.
14	x
15	Before:
16	HON. CHARLES E. STEWART, JR.,
17	District Judge.
18	September 3, 1974
19	Appearances:
20	MARVIN E. JACOB, Esq.,
21	RICHARD L. JAEGER, Esq., MERYL E. WIENER, Esq.,
22	for the Securities and Exchange Commission
23	LUNNEY & CROCCO, Esqs., for Sheffield Advisory Company, Sheffield
24	Advisory Company, S.A., and Sanford C. Shultes By: J. ROBERT LUNNEY, Esq.
25	MICHAEL J. MC ALLISTER, Esq.

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S.A. (Panama) -- there are two -- and New Providence
Securities, Ltd., S.A., we have contacted this morning
Mr. McAlpin, who is also a defendant in this case, and
indicated to him that we intended to bring on an action
for a temporary restraining order this afternoon at
four-thirty and advised him of the hearing before your
Honor.

With respect to that, we have heard nothing further. As I understand it, there appears to be no appearance by anyone with respect to those defendants.

MR. LUNNEY: Mr. McAlpin, to my knowledge, is a resident of Costa Rica, so whatever notice they gave him was by telephone, perhaps, so for him to have retained or be represented by counsel I think would be too presumptive of the SEC. As a matter of fact, myself, I only got the papers at noon today.

MR. JAEGER: We notified Mr. McAlpin this morning sometime with respect to this matter.

That leaves the remaining defendants, ENG Enterprises, Ariel Guttierrez and Enrique Gutierrez.

EHG Enterprises, Inc., is a Puerto Rican

Corporation engaged in real estate development, and Ariel

Gutierrez is the president of that corporation and Enrique

Gutierrez is the chairman of the board of that corporation.

Now, this morning we contacted counsel, Mr.

Laurence Greenwald of Stroock, Stroock & Lavan, who in the past have acted as counsel for the Gutierrezes in the previous SEC versus Vesco matter, your Honor, and also in prior appearances where we took testimony in the Commission proceeding and investigation in this matter and throughout all of these proceedings in the past year or two, they have represented these defendants.

Now, we contacted them this morning and I am advised by Miss Wiener that she had a conversation with Mr. Greenwald in which he did not indicate whether he would or would not represent the defendants in this case but there was an understanding that papers would be served upon him this morning with respect to this matter and we advised him of the hearing before your Honor at four-thirty this afternoon.

THE COURT: Yes. I would suppose that since this is a different matter or at least -- well, it is a different matter and I amnot surprised that Mr. Greenwald doesn't know at this point whether or not he will be retained by the Gutierrezes.

MR. JAEGER: The only concern we had, your Honor, was that as I have indicated he made no representation and did not mislead us in any way, but we were under the

impression, since he had in the past always represented them -- we thought it courteous at least to advise him of the matter.

THE COURT: Yes, I appreciate your efforts.

MR. JAEGER: He did not appear and we have contacted him, your Honor, and he has advised us that at this time he still does not know whether he intends to represent --

THE COURT: Did you serve EHG Enterprises or the Gutierrezes or notify them?

MR. JAEGER: We did not. We operated under the assumption that since he had been the attorney in the past it might be improper in fact to go around him and contact the defendants personally.

THE COURT: All right.

MR. JAEGER: Does your Honor wish to hear argument with respect to all of these defendants at this time?

you, Mr. Jaeger, that I have to adjourn today in less than fifteen minutes. I have to adjourn at five-thirty. I should tell you that on a very quick reading, and I mean a quick reading, I spoke with Mr. Bloch and Miss Wiener this morning and they handed me these papers and I have had a

the fact it is offshore funds.

THE COURT: That is what concerns me, Mr. Jaeger and Mr. Lunney. One thing I would like somebody to do is to remind me what I ought to be reminded about -- well, let me put it another way:

I am very clear, I have heard about Mr. McAlpin before. I have forgotten in what connection. Can you remind me?

MR. JAEGER: I think it is in the context of several instances.

First of all, in connection with the EHG transaction, McAlpin was connected with the Capital Growth Fund as we have alleged. They made an investment in EHG in 1968.

In 1972, the Dollar Funds and Vesco came in and made a substantial investment in EHG and at that time --

THE COURT: Six million or twelve million, depending on how you read it.

MR. JAEGER: That's correct. They made it twelve million put and six million in CD.

At that time as part of the deal, the transaction, the purchase was made back of the stock of Capital Growth purchased back at a million three at a loss to Capital Growth of \$700,000, but then there was another aspect on a

missing \$300,000 that nobody could find, which is that there were two sets of papers.

One set of papers said that the sale price was a million three, another set said that it is a million, so that there ended up to be a missing \$300,000 involved in the transaction.

That came in under the testimony of ENG. In fact, that was through the testimony of Mr. Gutierrez himself, part of the transaction.

So, it came in in that situation.

THE COURT: That isn't what I am trying to remember.

MR. JAEGER: There is also the San Cristobal transaction, in which \$2 million --

THE COURT: He was sort of a finder, was he, or promoter? This is what I am trying to remember.

MR. JAEGER: That was a Dr. Alvarez Heise, the uncle of the Gutierrezes.

in San Cristobal or have some interest relating -- I should say allegedly. All right. I remember enough on that.

All right. I remember enough.

I think, Mr. Lunney, what I am disposed to do is--- based on what background I have and what I have seen of

THE COURT: Your service paragraph just talks about service being made, without saying anything about mailing.

I beg your pardon, Mr. Jaeger. Just reading the last paragraph, your preliminary paragraphs indicate that you expect to make service by registered mail on many of these defendants.

MR. JAEGER: Your Honor, we will mail tomorrow, the first thing tomorrow --

THE COURT: Make it then by the 4th of September at 5:00 p.m.

MR. JAEGER: That's fine, your Honor.

THE COURT: I am signing this order as of

five-thirty.

MR. JAEGER: Your Honor, may I suggest a matter for the Court?

We did not seek to contact EHG. Possibly in view of your Honor's ruling with respect to --

THE COURT: I think you should.

MR. JAEGER: We will contact them and tell them they have an opportunity at 1:45 tomorrow to vacate the order as well and also we will call Mr. McAlpin again and advise him.

THE COURT: All right. You can conform your

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order to this.

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MR. LUNNEY: There are blanks on the first page.

THE COURT: I filled them in. ***

(Court adjourned.)

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by counsel on behalf of him or those other defendants.

THE COURT: All right.

MR. JAEGER: With respect to the EHG, the company itself and the two individual defendants connected with that company, the two Gutierrez brothers, we undertook to contact them personally last night and we spoke with Mr. Ariel Gutierrez and he advised that he thought he was represented by the Stroock firm, upon whom we served the papers earlier.

We contacted them this morning and they indicated that as yet they were not counsel for them and apparently there is some discrepancy at this point as to whether or not they are representing them or maybe the arrangements have not been culminated as of yet but we spoke to them twice today, the firms, and both times they indicated that they were not yet engaged as counsel for either the company or the two individual defendants.

so that leaves us where we started from yesterday, and that leaves us with the two defendants, the Sheffield companies and the individual defendant, Mr. Shultes, and if your Honor wishes to hear argument with respect to that, I am prepared.

THE COURT: Yes.

MR. JAEGER: I appreciate the time pressure that

Of Counsel.

LUNNEY & CROCCO, ESOS.,

Attorneys for Defendants,

BY: MICHAEL J. MC ALLISTER, ESO.,

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MR. JACOB: My name is Marvin E. Jacob on behalf of the SEC.

The Commission has come here this morning and proposed to the Court the entry of the preliminary injunction and the appointment of a receiver in respect of seven named defendants in this lawsuit who have, to date, neither appeared, filed or submitted any papers in opposition to the papers filed by the Commission in support of the relief it seeks.

Those defendants are Capital Growth Company, S.A.

(Costa Rica); Capital Growth Company, S.A. (Panama),

New Providence Securities, Ltd. S.A., Clovis W. McAlpin,

EHG Enterprises, Incorporated, Ariel E. Gutierrez, and

Enrique H. Gutierrez.

The notice required to be given to those seven defendants by order of this Court on September 3rd was given, affidavits in respect thereof are on file in this court, and in addition, it is clear that Mr. McAlpin and the companies he controls are aware of the fact that this lawsuit has been begun and that a hearing is scheduled to be held on this date as we have received from Mr. McAlpin a telegram only yesterday in which, while he proclaims his innocence, he states that under certain conditions he would consent to the appointment of an "administrator"

2 by the Court or by the SEC.

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Similarly, we have been in constant communication with him, of course, during the period from September 3rd

until this date with Ariel Gutierrez and a law firm which has heretofore been representing him in respect of similar

matters, Stroock & Stroock & Lavan.

THE COURT: Who was the Gutierrez who testified?

Ariel?

MR. JACOB: Ariel.

Based upon our conversations with the firm and with Mr. Ariel Gutierrez, it seems clear that they are not appearing in respect of the preliminary injunction or the appointment of a receiver sought by the Commission.

Mr. McAllister, on behalf of the Sheffield

Companies, and Mr. Shultes, has requested an extension

of time of several weeks which would go beyond the expiration

of the 20-day period normally governing the effectiveness,

in our view, of temporary restraining orders.

We have stated to Mr. McAllister that in our view September 23rd is the expiration of 20 days from the entry, the initial entry of the TRO on September 3rd, and that if the hearing on preliminary injunction were to be continued until sometime in October when Mr. McAllister is seeking that it be continued, there could be

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no assurance that the temporary restraining order could continue in effect.

Accordingly, we have, in light value of these facts --

THE COURT: Well, I think there is at least

a footnote to that that Mr. McAllister has indicated that
they would consent to such a continuation.

MR. JACOB: Mr. McAllister has suggested that he on behalf of those three defendants, would consent to the continuation of the temporary restraining order until the hearing.

However, we have pointed out that that wouldn't provide for the TRO remaining in effect beyond the 20-day period in respect of persons who are not consenting, to wit, the seven defendants not represented by Mr. McAllister and who have neither appeared nor contested the allegations of the Commission.

The Commission has, therefore, submitted an order of preliminary injunction and for the appointment of a receiver in respect of those seven defendants not represented by Mr. McAllister.

We have carefully deleted from that order any reference to the clients who Mr. McAllister represents so that his clients' rights are preserved in respect of the

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trial of this case.

We certainly have every intention of shortly submitting to the Court in accordance with Rule 52 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law to underline the entry of this order.

THE COURT: Which you will of course submit at the same time to Mr. McAllister.

MR. JACOB: We certainly will, your Honor.

MR. MC ALLISTER: On notice, your Honor.

THE COURT: Yes.

MR. MC ALLISTER: How many days?

THE COURT: I would think five days.

MR. MC ALLISTER: Thank you, your Honor.

MR. JACOB: Your Honor has suggested that, again, in order to more fully protect the rights of the clients of Mr. McAllister that the additional provision be made in the order that states expressly that the receiver take no material steps including any in respect of the clients of Mr. McAllister without further order of this Court, and I have here, your Honor, a drafted provision for inclusion and delineation in the order, and I have written it out.

THE COURT: Why don't you read it?

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have met and solved long ago in connection with other receivership statements.

I would therefore only suggest, if it is consistent with what your Honor is thinking about, and with the permission of the Court, that I would like to see a receiver who could go to the gut of the problems, the heart of the problems here without getting bogged down with details that others could deal with in seconds because they know the answers.

If possible, your Honor, a man of Mr. Shemmer's qualifications based upon what he has already done in other receiverships seems eminently qualified despite the fact that he may be working full time now, on other matters, seems eminently qualified for this kind of a task.

His law firm too is aware that he is knowledgeable in these areas, and I just submit that for the consideration of the Court knowing full well that the appointment of a receiver is completely within the discretion of your Honor.

THE COURT: I was about to ask counsel if they had any notions who I might appoint as a receiver.

I am reluctant to appoint Mr. Shemmer as a receiver here. It seems to me that he has got enough to do and secondly I don't know enough about this matter but I worry

that perhaps since some of the defendants here are -not defendants but are involved in the Vesco matter,
that it possibly might create a conflict.

Do you have any notions about this, Mr. McA

Do you have any notions about this, Mr. McAllister?

MR. MC ALLISTER: I never heard of Mr. Shemmer

before.

THE COURT: Mr. Shemmer is a receiver that I appointed to administer a preliminary injunction in the Vesco matter which involves Mr. Gutierrez.

MR. MC ALLISTER: Your Honor, I would take -THE COURT: Do you have ano notions about -- I am
not going to appoint Mr. Shemmer.

MR. MC ALLISTER: I don't want anybody connected with the Vesco matter appointed here, your Honor.

THE COURT: All right. I don't disagree with that, Mr. McAllister. Do you have any notion about the type of person I ought to look for?

MR. MC ALLISTER: No, sir. I will leave that completely to the Court's discretion.

THE COURT: If Mr. Shemmer were totally free, that would be a different question.

Mr. McAllister, you take offense very quickly.

MR. MC ALLISTER: Yes, I do, sir.

THE COURT: I will have to consider this. It is

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not going to be Mr. Shemmer.

MR. JACOB: I would only note for the record that I don't think we ought to get into a discussion of this by dignifying the offenses taken. I put this on the record in front of you. I don't think there is anything wrong with you.

THE COURT: Mr. Jacob, I think we discussed this far enough.

MR. JACOB: Your Honor, this is the paragraph, and it can either be written in by your Honor now after your Honor has read it so that it appears on the original. Ordered the said receiver file with this Court right after that period and it is further ordered.

THE COURT: Would you give that to your friend on the left to write it in fcr me.

MR. JACOB: I just thought that your Honor would like to write it in and initial it but if that is not the case that is all right. I'll do it.

Of course, the amount of the bond and the name of the receiver and the date by which the bond must be filed have been left blank.

THE COURT: My notion would be that the amount of the bond ought to be something like \$25,000. Does that bother either of you?

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MR. JACOB: It doesn't bother me, your Honor.

MR. MC ALLISTER: No, sir. We are talking about a 14 million dollar estate, as I understand the complaint with regard to Capital Growth but I can assure you that that would more than cover my clients.

THE COURT: All right, thank you very much, gentlemen.

(Adjourned.)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION.

Plaintiff.

- against -

74 Civ. 3779 (CES)

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL CROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. MCALFIN
SANFORD C. SHULTES
ARIEL E. GUTIMEREZ
ENRIQUE H. GUTIERREZ,

: PRELIMINARY INJUNC-TION AND APPOINTMENT : OF A RECEIVER

Defendants.

Plaintiff Securities and Exchange Commission ("Commission") having moved for a preliminary injunction, appointment of a receiver, and such other and further relief as this Court may deem just and appropriate and pending hearing thereon a temporary restraining order, and this Court having issued a temporary restraining order on September 3, 1974 and having heard reargument with respect thereto on September 4, 1974 having continued said temporary restraining order in effect without modification, and the Commission having given notice to the defendants herein of the hearing on the preliminary injunction and the appointment of a receiver, both orally and in the manner set forth in the Order of this Court dated September 3, 1974, and defendants Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Ariel E. Gutierrez and

Enrique H. Gutierrez having neither appeared nor filed or submitted any papers in opposition to the affidavits and other
papers filed by the Commission in support of its motion, and
the allegations of the Commission which, among other things,
recite violations of Section 10(b) of the Securities Exchange
Act of 1934 and Rule 10b-5 thereunder and the misappropriation
of assets being uncontroverted, and it appearing that the entry
of this Order is appropriate and necessary and in the public
interest, it is hereby

ORDERED that defendants apital Growth Company, S.A. (Costa Rica), Capital Growth Company (Foreca), New Providence Securities, Ltd., S.A. EHG Enterprises, Inc., Clovis W. McAlpin, Ariel E. Gutierrez and Enrique H. Gutierrez, their officers, directors, nominees, agents, servants, employeds, attorneys, successors, assigns, depositories, banks and those other persons acting in active concert or participation with them be and hereby are enjoined and restrained, pending the final determination of this action, from directly or indirectly, expending, dissipating, reducing, encumbering, investing, transferring, or otherwise disposing of or exercising any control over the present and future assets of Capital Growth Company, S.A. (Costa a) and Capital Growth Company, S.A. (Fanama), in whatever for the second appear; and it is further

CRDERED that defendants Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Fanama), New Providence Securities, Ltd., S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Ariel E. Gutlarrez and Enrique H. Gutlerrez, their officers, directors, nominees, agents, servants, employees, attorneys, successors, assigns, depositories, banks and those other persons

acting in active concert or participation with them be and hereby are enjoined and restrained, pending the final determination of this action, from directly or indirectly, in connection with the purchase or sale of any security, by use of the means and instrumentalities of interstate commerce, the mails, or facilities of any national securities exchange,

- employing any device, scheme, or artifice to defraud,
- 2) making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- 3) engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security; and it is further

of this action, Michael of Ciemstrong be and hereby is appointed receiver of defendants Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama) and of the voting securities of defendant New Providence Securities, I.A., S.A. owned or controlled by defendant Clovis W. McAlpin and the other defendants enjoined herein, said receiver to:

(i) take possession and control of the books, records, assets and properties of defendants, Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama);

- of Capital Growth Company, S.A. (Costa
 Rica) and Capital Growth Company, S.A.

 (Panama) wrongfully received or otherwise
 misappropriated by New Providence Securities,
 Ltd., S.A., EHG Enterprises, Inc., Clovis
 W. McAlpin, Ariel E. Gutierrez and Enrique
 H. Gutierrez in whatever form said assets may
 presently appear;
- (iii) take possession and control of all of the
 voting securities of Capital Growth Company,
 S.A. (Costa Rica) owned or controlled by defendant New Providence Securities, Ltd., S.A.
 and the other defendants enjoined herein, the
 voting securities of Capital Growth Company,
 S.A. (Panama) held by defendant Capital Growth
 my, S.A. (Costa Rica), and the voting
 in arities of defendant New Providence Securities, Ltd., S.A. owned or controlled by defendant Clovis W. McAlpin and the other defendants
 enjoined herein;
 - (iv) ascertain the true state of affairs of Capital
 Growth Company, S.A. (Costa Rica) and Capital
 Growth Company, S.A. (Panama) and New Providence
 Securities, Ltd., S.A. and report thereon to the
 Court and those interested in said defendants;
 - (v) seek disgorgement and an accounting from defendants New Providence Securities, Ltd., S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Ariel E. Gutierrez

and Enrique H. Gutierrez of all misappropriated monies, securities and assets of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama); and

(vi) act in the capacity of an equity receiver as appropriate in the circumstances;

and it is further

ORDERED that defendants New Providence Securities, Ltd., S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Ariel E. Gutierrez and Enrique H. Gutierrez, be and hereby are required to assign, transfer and deliver to said receiver appointed herein all of the voting securities of Capital Growth Company, S.A. (Costa Rica) owned or controlled by them; and it is further

ORDERED that defendant Clovis W. McAlpin, in his capacity as a trustee, and in any other capacity, designate said receiver as his proxy with regard to any and all shares of New Providence Securities, Ltd., S.A. as to which defendant Clovis W. McAlpin has voting rights or authority; and it is further

ORDERED that said receiver file with this Court within

4.0.(5) days from the date of his appointment a bond satisfactory

to this Court in the amount of 8/0,000.00; and it is further

ORDERED that in no event shall said receiver take any material steps in the discharge of his functions, including but not limited to, any such steps in respect of defendant Sanford C. Shultes, Sheffield Advisory Company and Sheffield Advisory Company, S.A., without leave of this Court on notice.

UNITED STATES DISTRICT JUDGE

Dated: New York, New York September 24, 1974

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(SAME TITLE)

NOTICE OF SPECIAL APPEARANCE WITHOUT SUBMITTING TO THE JURISDICTION OF THE COURT OF CO-DEFENDANTS ENG ENTERPRISES INC. ARIEL E. GUTIERREZ AND ENRIQUE Y. GUTIERREZ TO QUASH PERVICE; TO VACATE PRELIMINARY INJUNCTION AND APPOINTMENT OF RECEIVER; TO SET ASIDE DEFAULT PURSUANT TO RULE 55(c) AND 60(a) OF THE F.R.C.P. AND FOR EXTENSION OF TIME UP TO NOVEMBER 15, 1974 TO PLEAD OR ANSWER

TO: Securities Exchange Commission, through Marvin E. Jacob, Associate Regional Administrator; Sanfor C. Shultes, through Lunney and Crocco, Esquires to the attention of J. Robert Lunney, Esq. and to Sheffield Advisory Company and Sheffield Advisory Company S.A. through Robert Lunney, Esq.

Ariel E. Gutierrez, Enrique H. Gutierrez and EHG Enterprises Inc. in special appearance without submitting to the jurisdiction of the Court move this court on November 14, 1974, at 10 A.M. before Judge Charles E. Stewart, Jr., Room 1305, to quash service; to vacate preliminary injunction and appointment of receiver; to set aside default pursuant to Rule 55(c) and 60(a) of the F.R.C.P. and for extension of time up to November 15, 1974 to plead or answer; and, for other reasons more fully stated in the Memorandum and Affidavit in support of this Motion; and upon the pleadings, papers filed in the action and upon such other and further evidence as may be produced at oral argument.

Dated: October 30, 1974.

IRVING RADER
Attorneys for Appearing Parties
335 Broadway
New York, New York

GILBERTO MAYO &
RAFAEL CUEVAS
Co-counsel
P.O. Box 13802
Santurce, Puerto Rico, 00908

By: E/Gilberto Mayo GILBERTO MAYO UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

CAPITAL GROWTH COMPANY, S. A. (Costa Rica)
CAPITAL GROWTH COMPANY, S. A. (Panama)
NEW PROVIDENCE SECURITIES LTD. S. A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S. A.
EHG ENTERPRISES, INC.
CLOVIS W. Mc ALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ

74 Civil Action File No. 3779 (CES)

Defendants,

SPECIAL APPEARANCE WITHOUT SUBMITTING TO THE JURISDICTION OF THE COURT OF CO-DEFENDANTS EHG ENTERPRISES, INC., ARIEL E. GUTIERREZ AND ENRIQUE H. GUTIERREZ TO QUASH SERVICE; TO VACATE PRELIMINARY INJUNCTION AND APPOINTMENT OF RECEIVER; TO SET ASIDE DEFAULT PURSUANT TO RULE 55 (c) AND 60 (a) OF THE F.R.C.P. AND FOR EXTENSION OF TIME UP TO NOVEMBER 15, 1974 TO PLEAD OR ANSWER

A- THE COMPLAINT AND PETITION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER WERE SERVED UPON STROOCK, STROOCK & LAVAN NOT ATTORNEYS FOR THE HEREIN APPEARING PARTIES ON THE PRESENT CASE AND NOT AUTHORIZED AGENTS TO RECEIVE SERVICE OF PROCESS

The Securities and Exchange Commission on August 7, 1974, filed in this Court complaint, petition for order to show cause and temporary restraining order and served copies of same on Stroock, Stroock & Lavan, herein fter sometimes referred to as "The Lawyers" under the assumption that Stroock, Stroock & Lavan were the attorneys for the EHG Enterprises, Inc. Ariel E. Gutierrez, and Enrique H. Gutierrez, to whom hereinafter we shall refer to as the "EHG Group."

Simultaneously, with the servicing of papers on the aforementioned attorneys Miss Weiner, from the SEC / Legal Department, made
a long distance telephone call to Ariel E. Gutierrez to inform that papers
in the above captioned case were served on Stroock, Stroock & Lavan.

Mr. Gutierrez advised Miss Weiner, of his uncertainty as to Stroock,
Stroock & Lavan's legal representation of the EHG Group in the present
action. To such effect, a call was placed by Mr. Gutierrez to Stroock,
Stroock & Lavan and he was informed by an attorney by the name of Kanter
that Stroock, Stroock & Lavan definitely would not represent the EHG
Group unless they receive payment of fees for past services rendered.

Mr. Gutierrez advised the lawyers of their present financial difficulties
and suggested that a payment plan be discussed. However, the lawyers
rejected Mr. Gutierrez's proposition.

On September 3, 1974 at 5:30 P. M the Court issued a Temporary Restraining Order and set September 13, 1974 at 10:00 A. M. for a hearing on the preliminary injunction. Once again, upon information and belief, papers were served on Stroock, Stroock & Lavan, disregarding Mr. Gutierrez' conversation with Miss Weiner and copies of the documents were mailed to the EHG Group. The parties appearing herein are ignorant of whether or not the hearing for preliminary injunction was held or not on September 13, 1974, but, on September 19, 1974 the EHG Group was served personally in Puerto Rico with complaint, order to show cause, and temporary restraining order with annexed affidavit and an order for preliminary injunction and appointment of a receiver. EHG Enterprises, Inc., Ariel E. Gutierrez and Enrique H. Gutierrez, were at the time of commencement of this action and now are residents and domiciled in the Commonwealth of Puerto Rico. EHG Enterprises, Inc. has its principal office in San Juan, Puerto Rico and never has had an office in the City of New York, in the State of New York

^{1.} SEC means Securities and Exchange Commission

or in the Southern District of New York. In the same manner, upon information and belief, none of the said defendants had at the time of commencement of the present action any personal or real property in the State of New York, or within the jurisdiction of the Southern District of New York. The present action is an action in personam and no proper service was made upon the person of the appearing defendants. It is the position of the EHG Group that this Court lacks jurisdiction over the subject matter and over the EHG Group in the present action; that service upon a person or entity, not legally appointed attorney or designated agent to receive service is null and void and that for said reason service must be quashed and default entry secrete.

THE PRELIMINARY INJUNCTION ORDER SHOULD BE VACATED

The hearing for the preliminary injunction was set and supposedly held on September 13, 1974. No appearance was made by the EHG Group personally or through counsel. As explained in part "A" of this motion Stroock, Stroock & Lavan were not the attorneys for Gutierrez when service of papers was made. They had already severed any relationship with the EHG Group, and the EHG Group was in the process of hiring new counsel; but, in view of the adverse publicity that the actions filed by SEC against Vesco; IIT against EHG Group and the present case, the EHG Group was cut-off of all financial assistance by banking and financing institutions and the group was having problems in securing legal representation because of of the large retainer fee requested by the attorneys they approached. In part "A" of this motion it was explained that Stroock, Stroock & Lavan demanded immediate payment of fees for past legal services and even though, upon information and belief, about one half million dollars had been paid in fees to said law firm, they rejected any dialogue to agree on a payment plan and therefore, refused any further representation of the EHG Group. Therefore, service of papers upon a person not legally representing the defendants herein is null and void and any order or decree of this Court based on said service is null and void and should be vacated.

Upon information and belief, it was not until September 19, 1074 that the EHG Group was se ... In Puerto Rico with copy of the complaint and the other aforementioned documents. No answer has been filed to the complaint or objection filed to the temporary restraining order or preliminary injunction, for the aforementioned reasons. On the trip to New York by the attorneys Gilberto Mayo and Rafael Cuevas of the law firm of Cancio, Cuevas & Mayo, with offices at Banco Economías, Suite 1616, Hato Rey, Puerto Rico, 00919 and P.O. Box 13802, Santurce, Puerto Rico, 00908, and co-counsel Irving Rader with offices at 335 Broadway, New York, N.Y. 10013, and after the hearing held on the preliminary injunction in the case of SEC v Vesco et als. 72-Civ-5001 (CES) the aforementioned attorneys held a meeting at the SEC offices in New York with attorneys Richard L. Jaeger, Chief Counsel; Meryl A. Wiener, attorney, and Marvin A. Jacobs, Associate Regional Administrator. At said meeting it was requested from the SEC an extension of time for the EHG Group to plead and/or answer. Mr. Jaeger suggested that upon the acceptance of the terms of a Stipulation to be prepared by SEC then the SEC would be willing to grant such an extension and provided the EHG Group waive its right to ra le any objection to the preliminary injunction dated September 24,1974 and to the appointment of the receiver. The attorneys for the EHG Group counter-proposed that Mr. Jaeger submit a draft of a stipulation which would be studied by the attorneys in consultation with the clients. At that time copies of the complaint, order to show cause and temporary restraining order, and order of preliminary injunction were delivered to the EHG Group's attorneys. On Monday, October 21, 1974 the attorneys for the EHG Group received from Mr. Jaeger a draft of the Stipulation. After conferring with the EHG Group and passing judgment upon the way service was made, the group decided not to accept the Stipulation submitted by Mr. Jaeger and instead to contest the jurisdiction of this court, the service of process, the temporary restraining order, the preliminary injunction and the appointment of a receiver. A reading of the preliminary injunction will disclose the harsh terms of same and the extraordinary powers granted to the receiver

which may include among others taking possession of properties of the EHG Group.

C- SERVICE OF PROCESS SHOULD BE QUASHED AND DEFAULT SHOULD BE SET ASIDE

The default in the present case should be set aside and an opportunity should be granted to the EHG Group to present its objections to service of complaint, temporary restraining order, preliminary injunctions and appointment of receiver. Upon the Court setting asidedefault entry, time should be granted to the said defendants to answer and raise the appopriate defenses.

It is a well settled rule that for a Court to exercise its power to issue orders against defendants, it must be previously ascerted that the Court has jurisdiction over the subject matter and that said defendants have been properly brought to the jurisdiction of the Court.

It is also a well settled principle that cases should be seen on their merits and most particularly that type of action which shall affect permanently the reputation of the persons in their community. EHG Enterprises, Inc., Ariel E. Gutierrez and Enrique H. Gutierrez are one of the largest, real estate developers in the Commonwealth of Puerto Rico. The companies under the control and direction of the Gutierrez, employ directly approximately 2,000 persons and do business with companies that employ approximately another 6,000 persons. Therefore, any harm to the reputation of the Gutierrez or their business and any curtailment of their business activities will affect directly and indirectly approximately 8,000 families. This court should take notice that real estate developers are going through very hard times to the extent that President Ford has requested from Congress special legislation seeking from Congress an assignment of tan billion dollars to revitalize the industry. The statistics of the Labor Department of the Commonwealth of Puerto Rico show that

appproximately 30% of the labor force in Puerto Rico is unemployed. Thus, any additional shutdown of business in the Commonwealth will aggravate the critical economic and unemployment conditions in Puerto Rico. It is an established fact, that the greatest migration of Puertoricans to New York City usually occurs when things become difficult on the Island. Based on said fact, no great imagination is required to conclude that any harm caused to the Gutierrez' business is of highly public concern to the Commonwealth of Puerto Rico.

The civil rights cases have shown that courts are very sensitive to acts which may deprive a person of his property without due process. For this court to allow the default against the EHG Group to prevail, without any opportunity to contest the orders issued by this Court and particularly the appointment of a receiver with such broad powers, constitutes an abuse of discretions repugnant to the Constitution of the United States. The notions of fair play and justice for all entitle the EHG Group to have a day in Court to protect their interests. If the Court refuses to grant the group an opportunity to defend itself of the imputations made in the complaint by the SEC, such denial by the Court shall constitute a violation of the constitutional rights of the EHG Group and of due process, and such denial will result in irreparable damages to the EHG Group.

D- THE APPOINTMENT OF A RECEIVER

The appointment of a receiver in the present action is within the equitable power of a District Court. Nevertheless, it is a very extraordinary remedy which is generally looked upon with disfavor by the judges. There is no question that the SEC has a statutory duty of protecting investors all over the United States; but, such protection should be weighed in light of the hardships, inconveniences and damages that may result to all persons that may be affected by such appointment. The mentioning of the alleged confederate actions of the EHG Group with the other defendants in the action is so slim, inferential and unsupported by the evidence submitted by the SEC, as to require this Honorable Court to look with caution the

the petition of the SEC for such extreme remedy as the appointment of a receiver who may move to take possession or control of the assets of the EHG Group. The affidavit of Mr. Ariel E. Gutierrez which is annexed to the memorandum in support of this motion will disclose that the connection of the EHG Group with the other co-defendants was solely on the basis of legal bona fide arm-length transaction.

Notwithstanding the efforts and good business practice procedures used, it was and would have been impossible for the EHG Group to discover the scheme or conspiracy of the Vesco and McAlpin Groups. The Gutierrez brothers or EHG Enterprises Inc. were not directors, officers or management agents of any one of the companies mentioned as co-defendants in the action. The affidavit of Ariel E. Gutierrez will show that SEC intentionally withheld documents offered voluntarily by Ariel E. Guierrez which clearly demonstrate and explain all the transactions carried on by EHG Enterprises, Inc. and Ariel E. Gutierrez and Enrique H. Gutierrez with some of the co-defendants. The affidavit of Marvin A. Jacobs, and Jerald A. Lanzotti, atterneys for the SEC hold conclusions based upon information and belief with the sole intention of bringing the EHG Group into this action, without " a proper showing" in a collusive way and intended to harm the good name and reputation of the EHG Group. Only the SEC knows the reason for its ommission, in its petition for injuctive relief, of information and documents in their control and possession. Ariel and Henry Gutierrez deposed extersively before the SEC officials; voluntarily opened their files to the SEC and gave all the information requested. It seems to the petitioner herein that if the SEC had found that the EHG Group had acted in any manner in concerted action with the Vesco Group or the McAlpin Group, SEC would have felt obliged and would have made the EHG Group a defendant in the SEC v Vesco case, 72 Ci-5001 (CES). Not being such the case, the non inclusion of the EHG Group as a party in the aforementioned case creates the presumption

of a clearance of the EHG Group. The present action is nothing else but a fishing expedition of SEC unsupported by the evidence stimitted to the Court.

CONCLUSION:

By the arguments afore mentioned as to Ariel E. Gutierro, Enrique H. Gutierrez and EHG Enterprises, Inc., the service of process must be queashed; the order of preliminary injunction and appointment of receiver dated September 24, 1974 should be vacated; default entry should be ser aside; a re-hearing should be set; and, in the alternative should this Court vacate the entry of the default, that the time to plead or answer the complaint be extended up to November 15, 1974.

At New York, New York, this 37 day of October 1974.

IRVING RADER Attorney for Appearing Parties 335 Broadway New York, New York

GILBERTO MAYO &
RAFAEL CUEVAS
Co-counsel
P.O. Box 13802
Santurce, Puerto Rico, 00908

By :

GILBERTO MAYO

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION.

Plaintiff.

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES INC.

CLOVIS W. McALPIN SANFORD C. SHULTES ARIEL E. GUTIERREZ ENRIQUE H. GUTIERREZ

Defendants

74-Civil Action File No. 3779 (CES)

Affidavit of Ariel E.
Gutierrez in support
of memorandum of
Ariel E. Gutierrez
Enrique H. Gutierre:
and EHG Enterprises
Inc. in support of
motion to quash service; to set aside
default or in the
alternative for extension of time to
plead and/or answer

COULTY OF NEW YORK)
) ss:
STATE OF NEW YORK)

is consummated."

I, Ariel E. Gutierrez, individually and as President of EHG Enterprises, Inc. and its subsidiaries being duly sworn deposes and says:

Paragraph 21 of the complaint:

On September 5, 1969 EHG Enterprises, Inc. filed a Registration Statement with the SEC of the Commonwealth of Puerto Rico (Exhibit "A"), in accordance with the Blue Skies Law of the Commonwealth of Puerto Rico.

Said Registration Statement had a condition on Page 1, Paragraph 3 which states "the company has made a verbal agreement with Capital Growth Fund, a Bahamian Mutual Fund, which invests primarily in securities of U S Corporations for the sale by the company to Capital Growth Fund of 200,000 shares of common stock of the company at a purchase price of \$10.00 per share. It is expected that such sale will be consummated on the effective date of the Registration Statement of which this Prospectus forms a past of shortly after such effective date. No sales of the 15,000 shares, being offered herein will be made unless and until the sale of shares to Capital Growth Fund

Prior to the approval by the SEC of the Commonwealth of Puerto Rico, the SEC of the United States had issued a no-action letter dated August 18, 1969, Exhibit "B". The said no action letter was issued in connection with an official submission made on August 13, 1969 by Stroock, Stroock & Lavan, to EHG, which letter described the transactions that were later consummated with Capital Growth. Said letter is marked as Exhibit "C".

Said prospectus was duly approved by the SEC of the Commonwealth of Puerto Rico, Exhibit "D" on September 18, 1969.

On September 10, 1969 Capital Growth Fund purchased 200,000 shares and suscribed a restriction letter Exhibit "E". In Exhibit "A" at Page 2. Paragraph 1, the company disclosed that if Capital Growth purchased the 200,000 shares it would pay New Providence Securities Ltd., a Bahamian Corporation, which was the administrator for Capital Growth Fund, a \$100,000 brokerage commission. In addition in the same paragraph it was made clear that the Gutierrez brothers would transfer 10,000 shares of their own personal holdings to Mr. Alberto Inocente Alvarez, not an uncle, nor a director of the Gutierrez' and EHG respectively.

Pursuant to the restriction letter, Exhibit "E", EHG sold the 200,000 shares of stock to Capital Growth which at that time had Arawak Trust Co., Ltd., as a Trustge, and in the faceof certificate #9. dated September 10, 1969, it was written the restriction called for in said restriction letter marked as Exhibit "E". Said certificate is marked as Exhibit "F".

On July 16, 1971 Capital Growth informed EHG, that a new trustee had been appointed on their behalf and Certificate #9 was cancelled (Exhibit "F"), and a new Certificate #99 dated July 16, 1969 was issued to Fiduciary Trust Co. of New York, as trustee, (Exhibit "G").

On February 21 1972 Certificate 99 was cancelled and was transferred to Capital Growth Co. S.A. soon a request received from Fiduciary Trust Co. of New York. A new certificate #106, dated March 16, 1972 as issued to Capital Growth Co. S.A. (Exhibit "H").

On September 14, 1972 said certificate was cancelled by attorney Héctor Ceinos in Geneva, Switzerland, after Mr. C.W. McAlpin, as President of Capital Growth Co., S.A. and whose signature was authenticated by a member of the Banque de Financement S.A. (also called "Finabanque"), Exhibit "H", had endorsed said certificate.

On the same date, at the same place, in the presence of the same witness, certificate #108 dated September 14, 1972 was cancelled by attorney Héctor Ceinos and endorsed by Mr. J. H.

Burke, the person who Capital Growth represented that had acquired the shares of EHG Enterprises, previously held by Capital Growth S.A. Mr. Burke's signature was also authenticated by the same member of the "Finabanque". Certificate 108 is marked as Exhibit "I". Said certificate was cancelled and endorsed by Mr. Burke, because Enrique H. Gutierrez and Héctor Cainos had delivered on that date to Mr. J. H. Burke a check in the amount of \$1,300,000.00, marked as Exhibit "J".

Mr. J.H. Burke signed a receipt for the monies received and it is head nearled as Exhibit "K".

Exhibit "L" is a letter signed by Mr. Burke, Mr. C.W. McAlpin and Mr. Ariel E. Gutierrez which clearly states that on that date Mr. Burke was selling his shares of common stock to Mr. Ariel Gutierrez and was assigning to Mr. Gutierrez "all of his right, title and interest in and to the letter agreement entered into on the date hereof" between Mr. Burke and Capital Growth Company, S.A.

Page 4

Exhibit "M" is a letter signed by Mr. Burke on that same date in which he acknowledges the selling of the stock and receipt of payment in the aggregate amount of \$1,300,000.00. This letter was prepared by Counsel to EHG Enterprises Inc. and signed Mr. Ariel E. Gutierrez in London and was executed by Mr. Burke in the presence of Mr. Ceinos and Mr. Enrique H. Gutierrez, in Geneva where the sale of the shares took place. The letter that appears as Exhibit "H" of the affidavit of the SEC attorney in support of the petition for TRO and Preliminary Injunction dated September 14, 1972 addressed to Ariel E. Gutierrez and supposedly signed by J. H. Burke acknowledging receipt of \$1, 100,000.00 plus commission, to the best of my knowledge was not drafted and typed on the same date that we delivered the check of \$1,300,000.00; and, Exhibit "M" was delivered to us on that date. In my opinion this document was typed thereafter without my knowledge and without any delivery of said document to us. The first time that I saw this document was in 1974 when I appeared voluntarily before the SEC in New York in connection with the investigation that they were conducting of the affairs of Capital Growth. I have never acknowledged receipt of said letter a copy of which is hereby enclosed as Exhibit "N".

The 200,000 shares of stock of EHG Enterprises Inc. that I purchased personally from Mr. J. H. Burke, have never been re-sold, and in fact they were pledged to the Bahamas Commonwealth Bank as guarantee for the loan made by the Bank to me personally of \$1,300,000.00 which was used to purchase the 200,000 shares previously referred to. Subsequently to this pledge, EHG Int'l. Finance Corp. N. V. a subsidiary of EHG Enterprises of Florida Inc., re-paid this loan to the Bahamas Commonwealth Bank

and I delivered the 200,000 shares to EHG Enterprises of Florida Inc. in payment of the obligation which its subsidiary rHG International Finance Corp. N.V. had paid on my behalf.

EHG Enterprises of Florida is a wholly owned subsidiary of EHG Enterprises. Inc. EHG Enterprises Inc.'s stock is closely held by myself and my brother. Between us we presently control in excess of 98% of the common stock of EHG Enterprises. Inc.

At the time of the purchase of the shares formerly held by Capital Growth, subsequently held by Mr. J.H. Burke and purchased by me on September 14, 1972 I had no knowledge of any connection between Capital Growth Fund, C.W. McAlpin, New Providence Securities Ltd. and Robert L. Vesco and his associates.

Prior to the sale of the 200,000 shares on September 10, 1969 to Capitol Growth Fund and subsequently thereafter through the period up to September 14, 1972 I made a number of different inquiries with reputable institutions such as First National City Bank, Banco Credito y Ahorro Fonceño and independent accounting firms such as Price Waterhouse, Garcia Malave & Co. and Peat Marwick & Mitchell, in connection with the reputation of Capital Growth Fund and its management, Said inquiry did not disclose any unusual or dubious operations by said companies.

In September 1972 when I met with Mr. Vesco and his associates I made a number of inquiries with these institutions and independent firms as well as other firms in connection with the operations and reputations of these individuals. None of these ... quiries turned up any unusual or dubious operations of these individuals and it was directly stated by these individuals that they had no connection with Mr. McAlpin and any of his entities and to the best of my knowledge no concerted action existed between Mr.

McAlpin and his operation and Mr. Vesco and his operations. Further, I had no knowledge whatsoever that the SEC was investigating these individuals in the month of September 1972 which was the time that the transactions with these entities and individuals were being conducted. Further to the best of my knowledge and lain mation my counsel at that time, the law firm of Stroock, Stroock &Lavan who had extensive experience and connections with the SEC, had no knowledge of any private investigation being con sucted by said agency at that time or advised me of such fact; er that Stroock, Stroock & Lavan ever informed me that Mr. Vesco and his associates or Mr. McAlpin and his associates were engaged in any concerted action or conspiracy to defraud foreign or II.S. investors. Furthermore, neither I nor any other officer, director or employee of EHG have ever been a shareholder, director, officer, management agent of any of the companies of Mr. McAlpin and Mr. Vesco. Consequently, I had no way of knowing their investment policies, their management policies or any other material fact of the running of their business.

Certificate #109, annexed herein as Exhibit "O", was cancelled in London since Certificate 111, Exhibit "P" was issued to Baharias Commonwealth Bank Ltd. as guarantee to the \$1,300,000.00 loan.

Exhibit "Q", Certificate 113-A was duly cancelled on March 16, 1973 after the \$1,300,000.00 loan had been repaid to the Bahamas Commonwealth Bank, by EHG International Finance Corp. N.V. Consequently, I endorsed said certificate 113-A to EHG Enterprises of Florida Inc. On July 31 1973 Certificate 113-B Exhibit "R" was issued to EHG Enterprises of Florida Inc. which is the present holder of the 200 000 shares which were bought from Mr. Burke on September 14, 1972.

PARAGRAPH 22 OF THE COMPLAINT:

Rico and indicated his desire to sell the shares of stock that Capital Growth had purchased from EHG Enterprises on September 10, 1969. After lengthy negotiations and in view of the tight money market we finally agreed to the \$1,300 000.00 purchase price of said 200,000 shares. It is my belief that at the time Capital Growth purchased the shares of EHG Enterprises in September 1969, the value attached to the shares of two million dollars represented the fair market value of said shares at the time of the purchase. Said statement is based on the fact that EHG was at that time in the development of substantial real estate proyects whose market value exceeded their liabilities by more than ten million dollars.

PARAGRAPH 23 OF THE COMPLAINT:

The \$400,000.00 loan to New Providence Securities Ltd. was made by EHG on September 22, 1969 and New Providence issued a demand note of \$400,000.00 with interest at 1% per month. Said note is hereby marked as Exhibit "S". The repayment of the loan made to New Providence is shown in Exhibit "T", which fully describes the date of repayment of the short term of investment of EHG Enterprises. As shown in said Exhibit "T" on April 10, 1970 there was an outstanding principal balance of \$100,000.00 still due under the \$400,000.00 loan plus accrued interest in the sum of \$14,958.90 for a total debt to EHG Enterprises of \$114,958.00. On April 10th, this balance was satisfied when in accordance with an agreement made between New Providence Securities Ltd. and Federal Investments Ltd., a Bahamian Corporation, wholly owned by EHG Enterprises, Inc., entered into a "Charter Party" Agreement marked as Exhibit "U" whereby the boat "Given-Up" owned by New Providence Securities Ltd. was chartered in accordance with the terms and

conditions of said agreement.

A letter dated July 13, 1970 marked as Exhibit "V" establishes the correct amount owed to EHG since there was a return premium received by EHG on the insurance of the boat, which reduced the outstanding balance owed to EHC to \$113,274.21 as of April 10th, 1970.

On May 19, 1971 Federal Investments Ltd. sold the boat Give-Up to a third independent party and kept \$70,000 of the sales price in order to recoup a substantial portion of its investment on the boat. Exhibit "V-1" is a copy of the settlement agreement with New Providence Securities Ltd.

The \$100,000.00 brokerage commission paid to

New Providence Securities Ltd. was fully described in the Prospectus
filed with the SEC of Puerto Rico, (Exhibit "A").

PULCHASE OF BONDS OF THE NATIONAL LIBERATION PARTY OF CCSTA RICA

On September, 1969 FIBA Ltd., a Bahamian Corporation, and a subsidiary of EHG Enterprises Inc., invested in bonds of the National Liberation Party of Costa Rica in the amount of \$400,000.00 in accordance with the agreement shown herein as Exhibit "W". Said purchase was made as a short term investment and Exhibit "X" describes the purpose of the loan. Said loan was fully guaranteed with bonds duly issued by the National Liberation Party as per Exhibit "Y". In early 1970 said bonds were fully repaid to FIBA Ltd. and the bonds were turned over to the Government of Costa Rica for cancellation and FIBA, Ltd. received a yield on its investment of better than 15%.

The 10,000 shares of EHG which were given to

Alberto Inocente Alvarez as a finders fee was fully disclosed in the

Prospectus annexed herein as Exhibit "A" and said shares were

given from the personal holdings of the Gutierrez brothers as per

Exhibit "Z" and Exhibit "AA".

PARAGRAPH 31 OF THE COMPLAINT:

As to the allegation in Paragraph 31 of the complaint that EHG was seeking only \$6 000,000 in financing, that is not a correct statement. EHG was looking for in excess of ten million dollars as established in my deposition before the SEC.

PARAGRAPH 32 OF THE COMPLAINT:

It has been previously explained.

PARAGRAPH 33 OF THE COMPLAINT:

As part of the agreement for the purchase by Capital Growth Real Estate Fund, Inc. of the 50% interest in four parcels of undeveloped land in Puerto Rico, it was agreed that a commission of \$180,000.00 would be paid to the Management Company of the Real Estate Fund. Mr. C. W. McAlpin at the time of the transaction represented to us that as a matter of general policy of the Real Estate Fund, the management company of said Fund was to receive 6% of the sales price of any asset purchased for the Real Estate Fund. 6% in the case of this particular transaction amounted to \$180,000.00 (6% x 3,000,000.00 = 180,000.00)

PARAGRAPH 34 OF THE COMPLAINT:

As to paragraph 34 at the time of the purchase of the shares of Transcaribbean Real Estate Properties, Inc. a subsidiary of the Real Estate Fund of Capital Growth, Golden Beach Corp. paid \$1,600,000.00 for said shares which represented a profit to the fund of approximately half million dollars.

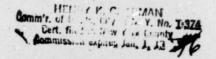
PARAGRAPH 35 OF THE COMPLAINT

To the best of my recollection—for extensions to the maturity dates of the notes issued by Golden Beach for the purchase of the shares of Transcaribbean Real Estate Properties Inc. from the Real Estate Fund

of Capital Growth we paid extension, financing and advisory fees totalling an aggregate sum of \$80,000.00, of which four were made by check which are marked as Exhibits "BB", "CC", "DD", and "EE", for a total amount of \$60,000.00 and \$20,000.00 were sent by wire on October 5, 1971 as shown in Exhibit "FF" which is part of the accounting records of EHG Enterprises Inc.

ARIEL E. GUTIERREZ

Sworn to before me this 30 day of October 1974.



Notary Public

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

: 74 Civ. 3779(CES)

- against -

CAPITAL GROWTH COMPANY, S.A. (COSTA RICA)
CAPITAL GROWTH COMPANY, S.A. (PANAMA)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC
CLOVIS W. MCALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ,

: AFFIDAVIT OF

MERYL E. WIENER IN SUPPORT OF MEMORANDUM OF PLAINTIFF SUBMITTED

: IN OPPOSITION TO

SPECIAL APPEARANCE AND:
MOTION OF DEFENDANTS
EHG ENTERPRISES, INC.,

ENRIQUE H. GUTTERREZ AND

Defendants.

STATE OF NEW YORK)
)ss:
COUNTY OF NEW YORK)

MERYL E. WIENER, being duly sworn, deposes and says:

- I am an attorney employed by the United States
 Securities and Exchange Commission ("Commission") in its New York Regional Office.
- 2. I make this affidavit upon personal knowledge in support of the Commission's memorandum in opposition to the special appearance and motion of defendants EHG Enterprises, Inc., ("EHG"), Ariel E. Gutierrez and Enrique H. Gutierrez 1/which seeks to quash service, to vacate the preliminary injunction and appointment of the receiver and to set aside default.
- 3. On September 3, 1974 at 9:00 a.m., the Commission filed its Complaint against the defendants herein, and brought on a hearing for a Temporary Restraining Order and Order to Show Cause.

^{1/} Unless otherwise indicated, EHG, Ariel E. Gutierrez and Enrique H. Gutierrez will be referred to collectively as the EHG group.

- 4. A hearing on a temporary restraining order was set before the Honorable Charles E. Stewart, Jr., United States District Judge, 4:30 p.m. that afternoon.
- 5. On September 3, 1974, at approximately 10:30 a.m., I placed a call to Laurence Greenwald, Esq., of Strook & Stroock & Lavan, Esqs., who had heretofore represented the EHG group in Commission related matters. At that time Greenwald stated to me that his firm "had not yet been retained". Nevertheless, I advised him that the Commission had filed a complaint in this action earlier that morning, and that a hearing on a temporary restraining order was scheduled for 4:30 p.m. that afternoon, in room 102, United States Courthouse, Foley Square, New York, New York. 2/
- 6. At approximately 11:30 a.m. on september 3, 1974 copies of the Order to Show Cause and Temporary Restraining Order, the memorandum in support thereof and the complaint were hand-delivered to Laurence Greenwald at the offices of Stroock & Stroock & Lavan, 61 Broadway, New York, New York.
- 7. At 4:25 on September 3, 1974, I again telephoned Greenwald, this time from a telephone booth outside the courtroom where the hearing on the Temporary Restraining Order was to take place, and asked him whether he would be appearing. He again stated to me that his firm had not yet been retained.
- 8. Upon returning to my office from the aforesaid hearing, I placed telephone calls to Laurence Greenwald,
 Enrique Gutierrez and Ariel Gutierrez. Laurence Greenwald and
 Enrique Gutierrez could not be reached. I then called the home

^{2/} Affidavit of Notice of Meryl E. Wiener dated September 3, 1974.

of Ariel Gutierrez and spoke to his wife, Mrs. Letty

Gutierrez and advised her of the substance and entry of the

temporary restraining order, and of the opportunity to vacate

same the following day at 12:45 p.m.

- 9. At approximately 7:00 p.m. on September 3, 1974,

 I spoke with Ariel Gutierrez and advised him of the substance
 of the order and the fact of its entry. He represented to
 me that he would communicate the substance of our conversation
 to his brother, Enrique H. Gutierrez.
- 10. At approximately noon on September 4, 1974 I caused duly conformed copies of the order to be sent Certified Mail, Return Receipt Requested, to the offices of EHG Enterprises, Inc., Ariel E. Gutierrez, and Enrique H. Gutierrez, El Caribe Building, corner of Palmeras and Jeronimo. San Juan, Puerto Rico. In addition, at approximately 10:00 a.m. on September 4, 1974, I telephoned Laurence Greenwald and advised him of the substance of the order and the fact of the entry, and caused a duly conformed copy of the order to be hand-delivered to the defendants, c/o Stroock & Stroock & Lavan to the attention of Laurence Greenwald at 61 Broadway, New York, New York. Greenwald was handed said copies at approximately 2:10 p.m. on September 4, 1974. 3/
- by Laurence Greenwald of Stroock & Stroock & Laven which reiterated the position previously taken, namely, that the firm had not "as of the present time been retained" in this matter. The letter advised contacting the defendants directly.

^{3/} Affidavit of Service of Meryl E. Wiener and Jack A. Lustig dated September 9, 1974.

- 12. In the afternoon of September 5, 1974, I telephoned Ariel Gutierrez and informed him that the hearing on the Commission's motion for a preliminary injunction had been changed to 10:00 a.m. from 9:30 a.m. on September 13, 1974.

 Ariel Gutierrez stated that he would impart this information to his brother Enrique Gutierrez. Ariel Gutierrez further stated that he had not as yet retained counsel nor had he decided whether he would be appearing.
 - Marvin E. Jacob, Esq., Associate Regional Administrator of the New York Regional Office was mailed to Ariel E. Gutierrez and Enrique H. Gutierrez notifying them of the time change on the hearing scheduled for September 13, 1974.
 - again telephoned Ariel Gutierrez and asked him whether
 he had retained counsel. He stated to me that he had not
 yet done so, nor did he know what course of action he would be
 pursuing, but, he doubted that he or his brother would be
 appearing at the hearing scheduled for September 13, 1974.
 - 15. On September 25, 1974, I caused duly conformed copies of the preliminary injunction and appointment of the receiver signed by the Honorable Charles E. Stewart, Jr. on September 24, 1974, to be mailed to the offices of EHG Enterprises, Inc., Ariel E. Gutierrez and Enrique H. Gutierrez to the office address of EHG Enterprises, Inc., El Caribe Building, corner of Palmeras and Jeronimo, San Juan, Puerto Rico.

- 16. On October 4, 1974, I received the affidavit of Eduardo Castillo Blanco, which represented that he had personally served ENG Enterprises Inc., Ariel E. Gutierrez and Enrique H. Gutierrez with the summons and complaint in this action on September 19, 1974.
- 17. On October 15, 1974, Marvin E. Jacob, Richard

 L. Jaeger and I met with Gilbert Mayo Aguayo, Esq., and

 Rafael Cuevas Kuinlam, Esq., Puerto Rican counsel to the

 defendants and with Irving Rader, Esq., their local counsel.

 They asked for and we agreed to send them a stipulation

 prepared for their signature extending their time to answer

 the complaint, notwithstanding the fact that the time in which

 to file an answer to the complaint was then past due.
- 18. On October 18, 1974, I caused said stipulation to be delivered to Irving Rader at 335 Broadway, New York, New York, copy to Gilberto Mayo Aguayo in Puerto Rico.
- 19. Beginning the week of October 20, 1974, up to and including the day of October 30, 1974, I telephoned Irving Rader on numerous occasions and asked him when he would be returning the signed stipulation to us. Rader told me that he would be discussing the matter with Mr. Mayo and Mr. Gutierrez upon their arrival in New York City, and would be returning same to me. He never proposed alternative provisions to the stipulation.
- 20. On October 31, 1974, Irving Rader personally served on the Commission copies of the EHG group's motion and memorandum in support thereof seeking to quash service and

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set aside the preliminary injunction and appointment of receiver and/or extending time to answer.

MERYL E. WIENER

Sworn to before me this day of November

NOTARY PUBLIC

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, : 74 Civ. 3779(CES)

-against-

REPLY AFFIDAVIT

CAPITAL GROWTH COMPANY, S.A. (COSTA RICA)
CAPITAL GROWTH COMPANY, S.A. (PANAMA)
NEW PROVIDENCE SECURITIES, LTD., S.A.:
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.:
EHG ENTERPRISES, INC.
CLOVIS W. MCALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ,

Defendants.

CITY & COUNTY OF NEW YORK) 88.:

TAVING RADER, being duly sworn, deposes and says:

- I. I am one of the attorneys for the defendants,

 EMG ENTERPRISES, INC., ARIEL E. GUTIERREZ and ENRIQUE H.

 GUTIERREZ, and make this affidavit in reply to the affidavit

 of Meryl E. Wiener made in opposition to the special appearance and motion of said defendants to quash service, to

 vacate the preliminary injunction and appointment of the

 receiver and to set aside default.
- I am familiar with all the facts and proceedings in this action since I was retained on or about October
 1974.
- 3. I must take issue with the affidavit of Meryl

 E. Wiener as to which I have personal knowledge, namely,
 her allegations concerning the proposed stipulation extending

the time of the defendants to answer contained in paragraphs "17" through "20" of said affidavit. We agreed at the meeting on October 15, 1974, at the office of the Commission, that the defendants' time to answer the complaint which was served on them in Puerto Rico on September 19, 1974, would be extended for 30 days and that the defendants would make no further applications to extend their time to answer. The stipulation was to be prepared and sent me by the Commission. I received a copy of the proposed stipulation on October 18, 1974, and Mr. Mayo received a copy in Puerto Rico several days later by mail from the Commission. Annexed is a copy of said stipulation.

- 4. At no time at the meeting on October 15, 1974, was there any discussion or even mention that the defendants, as a condition to the extension of time to answer, would be required to waive any right they might have to contest the order for a preliminary injunction and the appointment of a Receiver entered September 24, 1974. I refer to paragraph "3" of the proposed stipulation.
- 5. Miss Wiener and I spoke to each other on several occasions between October 20, 1974, and October 30, 1974, regarding the stipulation. The substance of our conversations was that I could not sign the stipulation unless authorized to do so by the defendants and my co-counsel, Mr. Mayo. I also told her that the Commission had prepared not a simple stipulation extending the defendants' time to answer but made specific reference to paragraph "3" and its waiver of the defendants' right to contest the validity of

the preliminary injunction and the appointment of the receiver. Miss Wiener's response to that was that if the defendants had no assets which belonged to the CAPITAL GROWTH companies they should not be concerned with the preliminary injunction and the receiver. Of course, Miss Wiener's response begged the question, because that is exactly what this lewswit is about.

- 6. In the meantime I had spoken with Mr. Mayo on several occasions over the telephone who was also very concerned about the matter. I told Miss Wiener that I could do nothing further until Mr. Mayo and Mr. Ariel Gutierres arrived in New York on October 30, 1974.
- 7. On October 30, 1974, Mr. Mayo, Mr. Gutierres and I met at my office. They had reached a decision not to sign the stipulation in the proposed form in which decision I joined. Mr. Mayo had already prepared papers to open the default and to vacate the preliminary injunction and the appointment of a receiver, the application which is now before the Court.
- 8. I served said application upon Miss Wiener of the office of the Commission on October 31, 1974. I also served simultaneously the defendants' application to vacate the temporary restraining order and application for a preliminary injunction in the VESCO action made by IIT and joined in by the Commission, which has been determined by the Court.
- 9. At the time I served the papers on October 31, 1974, Mr. Jacob saw me and asked me to come into his office

for a talk. Mr. Jacob asked me the nature of my applications and I informed him. Confining myself here to the CAPITAL GROWTH case and the proposed stipulation prepared by the Commission, Mr. Jacob asked me whether it was not a short stipulation consisting of a few lines extending the defendants' time to answer. I told him it was not. Mr. Jacob's answer to that was that this was not his case but Mr. Jacob's case. The rest of our discussion concerned the VESCO matter.

- GUTIERREZ made in support of the application and am of the opinion that said affidavit sets forth a meritorious defense to this action which the defendants are entitled to litigate. He states what constitute at arms length transactions concerning the sale and subsequent re-purchase of 200,000 shares of EMG ENTERPRISES, INC., the sale to CAPITAL GROWTH FUND, and the purchase from MR. E. H. BURKE.
- of Meryl E. Wiener relating to the events of September 3, 1974, September 4, 1974, and subsequent dates in connection with the temporary restraining order, the preliminary injunction and the appointment of a receiver, it appears affirmatively that the defendants were deprived of jurisdictional due process.
- 12. It is not enough to attempt to serve the defendants by serving attorneys who represented them in other matters or making long distance telephone calls from New York to Puerto Rico. Concededly, Laurence Greenwald, Esq. of Stroock, Stroock & Lavan, Esqs. informed Miss Wiener by

retained". The plain meaning of these words is that Stroock, Stroock & Lavan, Esqs. do not represent the defendants in the action. Telephone calls to one of the defendants or the wife of one of them, assuming they were the persons intended, do not confer jurisdiction on the Court.

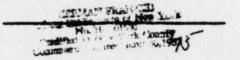
13. Such efforts might give the Court jurisdiction if the Countssien prior thereto had made bone fide attempts to serve the summons and complaint on the defendants and it affirmatively appears that the defendants were avoiding or evading such service. The Commission makes no such allegation and acknowledges that service of the summons and complaint was not attempted until September 17, 1974 and was effected on the defendants in Puerto Rico on September 19, 1974 (Commission's Emhibit C; paragraph 16 of Miss Wiener's affidavit).

WHEREFORE, I respectfully pray that the defendants' application be granted.

IRVING RADER

Sworn to before me this 21st day of November, 1974.

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION.

Plaintiff,

- against -

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. McALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ.

74 Civ. 3779 (CES)

:

STIPULATION AND ORDER EXTENDING TIME TO FILE ANSWER

Defendants.

WHEREAS, defendants EHG Enterprises, Inc. ("EHG"),
Ariel E. Gutierrez and Enrique H. Gutierrez were served with
a copy of the Complaint in this action on or about September
19, 1974; and

WHEREAS, an answer to said Complaint was to be filed on or about October 9, 1974; and

WHEREAS, defendants having failed to file a timely answer are in default; and

WHEREAS, defendants have retained counsel who have recently requested additional time within which to acquaint themselves with the facts of the immediate action and with the papers filed therein; and

WHEREAS, a preliminary injunction was granted on September 24, 1974 as to said defendants and certain other defendants;

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IS MEREBY STIPULATED AND AGREED, by and between the plain if and defendants EHG, Ariel E. Gutierrez and Enrique H. Gutierrez, by and through their attorneys of record herein, as follows:

- 1. The time within which the defendants EHG, Ariel

 E. Gutierrez and Enrique H. Gutierrez must answer the Complaint
 is hereby extended for thirty (30) days until and including

 November 15, 1974;
- 2. Within such thirty (30) days, plaintiff will not seek to enter a default judgment against defendants EHG, Ariel E. Gutierrez and Enrique H. Gutierrez;
- 3. Defendants EHG, Ariel E. Gutierrez and Enrique H.
 Gutierrez will not contest the validity of the Order of Preliminary Injunction and Appointment of a Receiver entered on
 September 24, 1974;
- 4. No further extensions of time will be sought by defendants EHG, Ariel E. Gutierrez and Enrique H. Gutierrez.

Dated: New York, New York October 1974

SECURITIES AND EXCHANGE COMMISSION

Attorney for Plaintiff

Irving Rader
Attorney for Defendants EHG, Ariel
E. Gutierrez and Enrique H. Gutierrez

SO ORDERED

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1	UNITED STATES DISTRICT COURT
2	SOUTHERN DISTRICT OF NEW YORK
3	x
4	SECURITIES AND EXCHANGE COMMISSION,
5	Plaintiff,
6	vs. 74 Civ. 3779
7	CAPITAL GROWTH COMPANY, S.A., (Costa Rica), CAPITAL CROWTH COMPANY, S.A. (Panama), :
8	NEW PROVIDENCE SECURITIES, LTD., S.A., SHEFFIELD ADVISORY COMPANY, :
10	SHEFFIELD ADVISORY COMPANY, S.A., EGH ENTERPRISES, INC., CLOVIS W. MCALPIN,
11	SANFORD C. SHULTES, ARIEL E. GUTIERRIZ and
12	ENRIQUE H. GUTIERREZ,
13	Defendants. :
14	х
15	Before:
16	HON. CHARLES E. STEWART, JR.,
17	District Judge.
18	New York, November 25, 1974,
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20	APPEARANCES:
22	RICHARD E. JAEGER, ESO., MARVIN E. JACOB, ESO., LERYL E. WIENER, ESO.,
23	Attorneys for Securities and Exchange Commission.
24	

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2 MARTIN F. RICHMAN, ESQ.,
PETER L. AGOVINO, ESQ.,

Attorneys for the Receiver, Michael F. Armstrong.

IRVING RADER, ESQ.,

Attorney for EGH Enterprises, Inc.

Present:

Gilberto Mayo, Esq.

THE COURT:

Mr. Rader?

MR. RADER: If your Honor pleases, the defendants EGH Enterprises, Inc. and the Gutierrez brothers are making an application to vacate their default in answering the summons and complaint and also to vacate the temporary injunction and receivership so far as they are concerned, which the court signed pursuant to an order dated, I believe, September 24, 1974.

The defendants I am representing were not personally served with the summons and complaint in this action, and that is admitted by the Commission in its opposing papers, until September 19th of 1974.

papers to Puerto Rico for service or at least the papers were not received for service in Puerto Rico until I think September 17, 1974.

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2	to come in and find a party and serve him with the
3	summons, in many instances your relief would be futile,
4	meaningless, and I think that is why the rule is other-
5	wise, which is to give them notice to be heard so that
6	you don't file a due process by taking away the
7	property without giving him a chance to be heard, that
8	you don't file a summons and complaint before getting
9	jurisdiction.
10	Miss Wiener has filed an affidavit concerning
11	this.
12	THE COURT: I think I've heard enough.
13	First of all, Mr. Rader, I will grant your

time to answer it. You say you have got an answer all ready?

MR. RADER: That's right.

THE COURT: When will you file it.

MR. RADER: I can serve it and file it to-

morrow.

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THE COURT: I'll give you until tomorrow to do so.

Now, as to your application with respect to the appointment, really, the question of preliminary injunctin, the appointment of a receiver, it seems to me, doesn't go to you at all, and I am going to dony

jba

your application. In doing so, however, I recognize that it may have been because of the geography or other reasons that you didn't get a chance to adequately present your position on the granting of a preliminary injunction as to the EGH group.

real chance of getting me to change my mind, Mr. Rader, but because of the possibility that there was excusable confusion, if you can persuade me and I'll give you the opportunity, you can present, not argument, but evidence with respect to the applicability and the need for preliminary injunction as to EGH, I might be inclined to hear it. I am not talking about argument. I think I've heard all the argument on the law that I need to.

I am persuaded that on the last my position is proper but, since you did not appear at the hearing for the preliminary injunction I will give you an opportunity to try to persuade me that you have evidence which would possibly lead me to seek a different result.

All right.

MR. RADER: Your Honor, shall I make an additional application?

THE COURT: I don't care what you do.

You

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go ahead and decide what you want to do, if anything. I understand.

THE COURT: Now, as to the order I am supposed to sign, is there anything I should know about that before I sign it. That is the order for the receiver. Does anybody want to tell me anything about that before I sign it?

MR. RICHMAN: I am Martin Richman, counsel for Mr. Armstrong, the receiver. I would like the record to show while Mr. Roller and Mr. Mayo are here that they have not presented, and I believe that they do not have any, specific objection to the terms of the order that we have submitted to your Honor.

THE COURT: All right.

. Nobody else wants to be heard on this order? MR. MAYO: May I say something, your Honor?

Your Honor, historically the federal court has been the proper forum to protect the rights of citizens not living in the jurisdiction. believe, your Honor, that due process has not been complied with in the service to the Gutierrezes. the affidavit of Miss Wiener of the SEC it is clearly stated that although very early in the morning Mr. Greenwald from Stroock & Stroock & Lavan advised Miss

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

74-Civ-3779 (CES)

Plaintiff,

V

CAPITAL GROWTH COMPANY, S. A. (Costa Rica)
CAPITAL GROWTH COMPANY, S. A. (Panama)
NEW PROVIDENCE SECURITIES, LTD, S. A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S. A.
EHG ENTERPRISES, INC.
CLOVIS W. McALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
ENRIQUE H. GUTIERREZ

ANSWER TO COMPLAINT

Defendants.

COMES NOW, co-defendants EHG Enterprises, Inc., Ariel E. Gutierrez and Enrique H. Gutierrez (EHG Group) by their attorneys and for their answer to the complaint states:

- 1. Paragraph 1 of the complaint is specifically denied as to Ariel E. Gutierrez, Enrique H. Gutierrez and EHG Enterprises, Inc., hereinafter sometimes referred to as the EHG Group. As to other co-defendants deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein.
- 2. Deny knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraphs 5, 6, 7, 9, 14, 15, 16, 17, 18, 19 20, 24, 25, 26, 27, 28 29, 30, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 10.
- 3. Deny each and every allegation contained in paragraphs 2, 3, 4, 22, 31, 32, 35, 49.
 - 4. Paragraph's II and 34 are admitted.
- 5. As to paragraph 8 it is admitted except that at the time the complaint was filed EHG Group had ceased operations in the State of Florida.

- 6. As to paragraph 12, EHG Enterprises Inc, Ariel E. Gutierrez and Enrique H. Gutierrez reallege the same admissions, denials and defenses made to paragraph's 1 through II and the same are hereby incorporated by reference.
 - 7. Paragraph 13 is denied as to the EHG Group.
- 8. As to paragraph 21 it is only admitted that McAlpin caused Capital Growth Funds to acquire 23% of the equity of EHG Group, represented by 200,000 shares of his common stock for \$2,005,000 in cash.
- 9. Paragraph 23 of the complaint is admitted with the exception that Inocente Alvarez is an uncle of the Gutierrez Brothers and that the 10,000 shares of EHG Enterprises Inc., transferred to him as a finder's fee were fully disclosed to the SEC of Puerto Rico, and that said shares were given from the personal holding of the Gutierrez Brothers; and, it is affirmatively alleged that the New Providence loan was repaid; that the \$100,000 brokerage commission paid to New Providence was fully described in the Prospectus filed with the SEC of Puerto Rico; that the loan made to the National Liberation Party of Costa Rica, was fully repaid by them.
- 10. From paragraph 33 it is only admitted that a commission of \$180,000 was paid.

FIRST AFFIRMATIVE DEFENSES

Plaintiff action is barred by the statutes of limitation.

SECOND AFFIRMATIVE DEFENSE

In the alternative action isbarred by laches.

THIRD AFFIRMATIVE DEFENSE

The court lacks jurisdiction over the persons of defendants and subject matter.

FOURTH AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which a relief may be granted.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff is estopped and has waived its rights to prosecute subject action because of its failure to advise defendants EHG Group that they were targets of its investigation, thus inducing testimony under oath to their detriment.

SIX AFFIRMATIVE DEFENSE

The plaintiff has failed to include indispensable parties.

SEVENTH AFFIRMATIVE DEFENSE

This court has no jurisdiction to appoint a receiver of any companies existing under the laws of Netherland Antilles or any assets wherever located of such company. In the alternative that this court has no legal basis to appoint a receiver to any company of the EHG Group or any assets wherever located of such group.

EIGHT AFFIRMATIVE DEFENSE

That the facts as alleged in the complaint having occured outside of the Southern District of New York, the US District Court for the Southern District is not the proper forum for the litigation of the action.

WHEREFORE the co-defendants, EHG Enterprises, Inc.,
Ariel E. Gutierrez and Enrique H. Gutierrez and EHG Group demand
judgment dismissing the complaint with costs and disbursements.

IRVINO RADER

Attorney for co-defendants

335 Broadway

New York, New York

GILBERTO MAYO RAFAEL CUEVAS Co-counsel UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

CAPITAL GROWTH COMPANY, S.A. (Costa Rica)
CAPITAL GROWTH COMPANY, S.A. (Panama)
NEW PROVIDENCE SECURITIES, LTD., S.A.
SHEFFIELD ADVISORY COMPANY
SHEFFIELD ADVISORY COMPANY, S.A.
EHG ENTERPRISES, INC.
CLOVIS W. McALPIN
SANFORD C. SHULTES
ARIEL E. GUTIERREZ
FNRIQUE H. GUTIERREZ,

(a) 74 Civ. 3770

Defendants.

MEMORANDUM

STEWART. DISTRICT JUDGE:

on September 3, 1974 by the Securities and Exchange Counteriories

("SEC") for injunctive relief and for the appointment of a

receiver. The complaint alleges violations of Section 10(b)

of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated
thereunder. Specifically, the complaint alleges that from

September 1968 up to the present all of the defendants at various
times have engaged in a course of conduct designed to convert
the assets of the Capital Growth companies for their own benefit
to the detriment of their shareholders.

On September 3, 1974, this court entered a temporary



MICROFILM
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restraining order ("TRO") which enjoined defendants from taking any action with regard to the present and future assets of Capital Growth Company, S.A. (Costa Rica) and Capital Growth Company, S.A. (Panama) and the voting securities of Capital Growth Company, S.A. (Costa Rica) and New Providence Securities, Ltd., S.A. The TRO further enjoined defendants from engaging in any acts in violation of Section 10(b) or Rule 10b-5.

Since the defendants may be classified in three similarly situated groups, each group will be discussed becaused.

1. The Sheffield Group

Defendant Sheffield Advisory Company, S.A. is a Fanamanian company with offices in New York City. It is the successor to defendant Sheffield Advisory Company, formerly a New York limited partnership with offices in New York City.

Sheffield served as investment adviser to defendant New

For purposes of convenience only we divide the defendants into three groups as follows:

^{1.} The Sheffield Group: defendants Sheffield Advisory Company, its successor, Sheffield Advisory Company, S.A. and Sanford C. Shultes.

^{2.} The Capital Growth Group: defendants Capital Growth Company, S.A. (Panama), Capital Growth Company, S.A. (Costa Rica), New Providence Securities, S.A. and Clovis W. McAlpin.

^{3.} The EHG Group: defendants EHG Enterprises, Inc., Ariel E. Gutierrez and Enrique H. Gutierrez.

^{2/} Reference to "Sheffield" in this opinion is to Sheffield Advisory Company, S.A. and its predecessor Sheffield Advisory Company.

Providence Securities, S.A. ("New Providence"), investment manager for the Capital Growth companies, with respect to the investment and reinvestment of the assets of the Capital Growth companies.

Defendant Sanford C. Shultes ("Shultes") is a United States citizen and a resident of New York City. Shultes managed and directed the affairs and was a substantial owner of Sheffield during the period covered by the complaint. From on or about October 15, 1971, to on or about July 25, 1972, Shultes was a director of New Providence and the Capital Growth companies.

The Sheffield group appeared in this action and requested an extension of time before the hearing on a preliminary injunction. Such an extension was given and during that time those defendants agreed with the SEC to settle the case against them. A permanent injunction was entered against Sheffield Advisory Company and Shultes on October 30, 1974. Following approval by its Board, defendant Sheffield Advisory Company, S.A. entered into a settlement agreement with the SEC on December 16, 1974.

2. The Capital Growth Group

Capital Growth Company, S.A. (Panama) ("CG Panama") is a wholly-owned subsidiary of the Costa Rica corporation Capital Growth Company, S.A. (Costa Rica) ("CG Costa Rica").

CG Panama was incorporated on August 4, 1972 and acquired substantially all the investments of CG Costa Rica on that date. The preferred shares of CG Costa Rica are held by approximately 16,000 public investors. On July 10, 1971, Capital Growth Fund, S.A. was converted into a close-ended investment company and changed its name on September 24, 1971 to Capital Growth Company, S.A. (Costa Rica).

Defendant New Providence and its predecessors have served as investment managers for the Capital Growth companies and own all of their common stock.

Defendant McAlpin owns or controls approximately sixty percent of the outstanding voting securities of New Providence. McAlpin, a resident of Costa Rica, has served as president and chairman of the boards of directors of the Capital Growth companies and of defendant New Providence.

in this case and a preliminary injunction was entered against them on September 24, 1974. At the same time, this court appointed a receiver to, inter alia, take possession and control of certain assets of the Capital Growth companies wrongfully received by other of the named defendants and to seek disgorgement and an accounting from those defendants of all misapproment

^{3/} The signing of the injunction was delayed while a receiver was found who could be included in the injunctive order.

priated assets of the Capital Growth companies. After the preliminary injunction was entered, this court received a request on behalf of CO Costa Rica to contest the preliminary injunction. A hearing was scheduled and held on September 24, 1974. The sole objection raised at that hearing and in subsequent papers filed with this court is one of subject matter jurisdiction. Defendant claims that under the laws of Costa Rica no foreign agency can have authority or competency over Costa Rican companies and no receiver may be appointed. Even assuming the validity of these arguments, they are addressed not to the SEC's allegations that American securities laws have been violated, but only to whether this court's orders can be implemented in a foreign jurisdiction, a question not presently before us.

this court had jurisdiction over the fraudulent scheme alleged in the complaint so that the injunction could be entered and the receiver appointed. We find that there was jurisdiction. Pirst we note that since the Costa Rican defendants have not answered the complaint nor challenged the entry of a preliminary injunction on grounds other than jurisdiction, our inquiry is limited. We can take the allegations of the complaint as well as the affidavits in support of the preliminary injunction as true with respect to the Capital Growth defendants and do not

need to set forth all the uncontested factual matters. See Carpenters' District Counsel v. Cicci, 261 F.2d 5 (6th Cir. 1958); cf. SEC v. Koenig, 469 F.2d 198, 202 (2d Cir. 1972); SEC v. Frank, 388 F.2d 486 (2d Cir. 1968).

Section 27 of the Securities Exchange Act of 1934 (15.U.S.C. §78aa) gives United States district courts subject matter jurisdiction over suits brought to enforce any liability or duty created by the Act or rules and regulations promulgated thereunder. If the Securities Exchange Act is applicable, therefore, this court has jurisdiction.

The leading cases in this circuit make it clear that subject matter jurisdiction will attach to the transactions here in issue if it can be established either that there was significant conduct within the territorial limits of the United States or that there was extraterritorial conduct which was harmful to and which had an impact upon United States investors.

Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968) rev'd in part on other grounds, 405 F.2d 215 (2d Cir. en banc, 1963), cert. denied sub. nom. Manley v. Schoenbaum, 395

U.S. 906 (1969). See also Travis v. Anthes Imperial Limited, 473 F.2d 515 (8th Cir. 1973). The Leasco court found that the fraudulent activities occurred within the United States. The

additional fact that the conduct complained of had an impact upon a United States company, its shareholders, or upon United States investors tips the scales in favor of applying the United States securities laws. The facts before this Court bring the present action well within the guidelines set forth in Leasco.

United States shareholders of the Capital Growth companies who state that they purchased their shares through the United States mails and, in one instance, after a sales pitch regarding Capital Growth's "status and ambitions" by defendant McAlpin at a group meeting in New York. In addition, the Capital Growth companies are alleged to have sent both stock certificates and sporadic literature regarding the companies through the United States mails to United States investors. As the Leasen court noted: "We see no reason why, for purposes of jurisdiction, to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it." Leasen v. Kerman, supra at 1335.

The SEC alleges that the above securities were offered and sold to public investors under representations which stressed

We do not find that jurisdiction in any way hinges on the number of United States investors. SEC v. United Fin'l Group Inc., 474 F.2d 354, 356 (9th Cir. 1973).

the companies' ties with the United States and the advantages of its securities markets. For example, the prospectuses stated: "Capital Growth Fund is one of the few mutual funds operating outside of the United States whose underlying investments are primarily in United States securities, whose management company has a Board of Directors primarily composed of executives within the United States The Fund's assets are invested with the assistance of investment advisors who are registered with the Securities [and] Exchange Commission of the United States." Thus, the companies' own statements lead us to conclude that there is sufficient contact here with the United States to assert jurisdiction. See SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943) ("promoters" offerings [should] be judged as being what they are represented to be").

The illiquid investments, non arms-length transactions and other activities alleged 1. the complaint with which the Capital Growth companies were involved were contrary to the representations and restrictions contained in

the above prospectuses of the companies. In addition, while prospective purchasers were told in the prospectuses that "the Sponsor [a subsidiary of the Management Company] will liquidate the shares in the planholder's account at 100% of the net asset value at the time instructions are received", the companies were close-ended without prior notice to or approval of the shareholders, thereby extinguishing the shareholders' right to redeem.

We find from these and other allegations made by
the SEC that sufficient acts occurred within the United
States which formed an essential part of the fraudulent
activities alleged to assert jurisdiction. Clearly, these
alleged acts, taken as true, had an impact upon United
States investors. Also, the uncontested factual allegations by the SEC of acts in the Southern District make venue
proper here.

Having found subject matter jurisdiction, we turn now to the merits of issuing the injunction and appointing a receiver. The Second Circuit has recently found the applicable standard for issuing a preliminary injunction to be "a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Sonesta International Hotels Corporation v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973). But see, Sampson v. Murray, 415 U.S. 61 (1972) (requiring irreparable harm for all preliminary injunctions). We find both these scandards to be met here. The SEC has alleged enough to show a violation of Rule 10b-5. These allegations, uncontested by the Capital Growth group defendants and therefore taken as true, clearly indicate success on the merits. In addition, a reasonable likelihood of future violations and thus a likelihood of irreparable harm to the shareholders of the Capital Growth companies may be inferred from these past violations even if defendants have ceased their prior illegal activities. SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963); SEC v. Culpepper, 270 F.2d 241, 245 (2d Cir. 1959). In addition, it is clear that since the American securities laws are applicable here, this court may exercise its general equity powers to appoint a receiver and to seek disgorgement of misappropriated funds. Mitchell v. Dellario

Jewelry, 361 U.S. 288 (1960) citing Porter v. Warner Co., 328

U.S. 395 (1946); SEC v. Manor Nursing Centers, Inc., 458

F.2d 1082 (2d Cir. 1972) and cases cited therein at 1105;

SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963); SEC v.

Lowler, 427 F.2d 190 (4th Cir. 1970); SEC v. Koenig, 469 F.2d

198 (2d Cir. 1972). We chose to do so in this case in view

of the strong SEC showing of fraudulent misappropriation of

monies by fiduciaries entrusted with the management of corporate

assets.

3. The EHG Group

Defendant EHG Enterprises, Inc. ("EHG") was incorporated and has its principal place of business in the Commonwealth of Puerto Rico. EHG is primarily engaged in real estate management, development and construction in Puerto Rico and, formerly, in the State of Florida. Defendants Enrique E. Gutierrez and Ariel E. Gutierrez, both naturalized United States citizens and residents of Puerto Rico, are chairman of the board of directors and president of EHG, respectively, and between them own in excess of ninety-eight percent of its common stock.

Since the EHG group defendants neither appeared nor answered the complaint, a preliminary injunction was entered against them and a receiver appointed on September 24, 1974.

Thereafter, on Cotober 11, 1974, the EHG group moved for a "special appearance" to quash service of process, to vacate the preliminary injunction and the appointment of a receiver, to set aside the default, and to request additional time within which to answer the complaint.

We have granted defendants' motion to reconsider the entry of the preliminary injunction and appointment of a receiver against them. Upon consideration of the arguments made before this court on November 25, 1974 and the papers submitted in connection with this motion, we adhere to our original decision.

There is no longer any need to file a "special appearance" to contest personal jurisdiction under Rule 12 of the Federal Rules of Civil Procedure. See 2A MOORE Federal Practice \$12.02-.03 (2d ed. 1974).

At oral argument on November 25, 1974, the ENG group defendants said that they were willing to answer the complaint the following day. The court directed that they do so and they did. It is unnecessary, therefore, to reconsider the request to vacate the "default" by these defendants' failure to answer the complaint.

While defendants have now answered the complaint and submitted both an affidavit of Ariel E. Gutierrez and a number of exhibits in connection with their motion, their argument against the preliminary injunction in their motion papers does not challenge the SEC's factual allegations. The Gutierrez affidavit which disputes some of the SEC's factual allegations does not dispute the major transactions but rather goes to the issue of Gutierrez' good faith dealing. Even if accepted, however, defendants' claim of good faith does not bar liability when the effect of such transactions is to defraud public investors. SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1036-97 (2d Cir. 1972). In addition, while this court stated during orangument that it would consider any further evidence which defendants wanted to offer on the question of whether the injunction should have been issued upon the facts of this case, no such evidence was submitted.

The questions of subject matter jurisdiction and venue raised on this motion have been fully considered above (in what constitutes our findings and conclusions as required by Rule 52 of the Federal Rules of Civil Procedure).

fendants, however, which this court has not previously considered. The crux of this contention is that these defendants were given inadequate notice of the proceedings to comport with due process. As a remedy, defendants seek to quash service of process and to vacate the preliminary injunction and appointment of a receiver. In order to dispose of the ENG defendants contention, we must review the factual sequence leading up to the court's order.

9:00 a.m. on September 3, 1974 and was accompanied by an order to show cause to bring on a hearing for a temporary restraining order ("TRO"). The hearing on the TRO was set for 4:30 p.m. on the same day. The affidavit of the SEC in connection with

The analysis regarding the Capital Growth group defendants applies to the EHO group defendants insofar as it established subject matter jurisdiction over the entire fraud theged in the complaint. It is, of course, an easier matter deal with the EHG group in terms of execution of the anti-ction since Puerto Rico is an American territory and as such is subject to the United States securities laws. Section 27, Securities Exchange Act of 1934 (15 U.S.C. §78aa). For example, the EHG defendants have not argued, nor could they do so, that a receiver cannot be appointed to seek disgorgement and an accounting of misappropriated assets.

defendants' motion herein states that two telephone calls were placed during that day to Laurence Greenwald, Esq. of Stroock & Stroock & Lavan ("Stroock") which firm had represented the EHG group defendants in other SEC related matters. On both occasions, at approximately 10:30 a.m. and 4:25 p.m., Greenwald apparently stated that his firm "had not yet been retained." At 11:30 a.m., in between the two telephone calls, copies of the order to show cause and proposed TRO, the memorandum in support thereof and the complaint were handdelivered to Greenwald at the offices of Stroock. The TRO was entered at 5:30 p.m. on September 3, 1974 with the provision that defendants would have an opportunity to vacate the order at 12:45 p.m. the following day. At 7:00 p.m., the SEC contacted Ariel Gutierrez in Puerto Rico and explained that the TRO had been entered, what it entailed, and that the defendants would be afforded an opportunity the following day to vacate the order. Ariel Gutierrez apparently stated that he would convey the information to his brother, Enrique Gutierrez (Wiener affidavit, p. 3).

On September 4, 1974 copies of the order to show cause and the TRO were sent by certified mail to the offices of the EHG group in San Juan, Puerto Rico. Copies of the orders were also delivered by hand to Greenwald at Stroock. A hear-ing for the preliminary injunction was set down for September

13, 1974. On September 5, 1974, the SEC again contacted Ariel Gutierrez by telephone and informed him of the date of the preliminary hearing. Ariel Gutierrez apparently again stated that he would communicate the information to his brother. Enrique Gutierrez (Wiener affidavit, p. 4). A letter dated September 6, 1974 was sent to both Ariel and Enrique Gutterres imparting the same information as the telephone call. On September 10, the SEC again called Ariel Gutierrez to enquire whether he planned to attend the hearing. He apparently stated that he had not yet retained counsel and did not know what course of action he would pursue (Wiener affidavit, p. 4). Additionally, he stated that he doubted whether he or his brother would attend the scheduled hearing. On September 25, 1974, conformed copies of the preliminary injunction and order appointing a receiver were mailed to the EHG group defendants in San Juan, Puerto Rico.

Considering this background fully, we find that defendants were given adequate notice to meet the requirements of Rule 65(a)(1) of the Federal Rules of Civil Procedure and due process of law. Rule 65(a)(1) requires that a preliminary injunction be issued only upon notice to the adverse party.

The rule does not specify the kind of notice to be given. The sufficiency of notice is for the trial court's determination under the circumstances of each particular case. 7 MOORE Federal

Practice 965.04[3] (2d ed. 1974); Plaquemines Parish School Board v. United States, 415 F.2d 817 (5th Cir. 1969). The constitutional standard required for due process is set forth by the Supreme Court in Mullane v. Central Hanover & Trust Company, 339 U.S. 306, 315 (1950).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance... But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

We find here that under the circumstances of the present case, group the EHG/defendants received sufficient notice of the proceedings against them and an adequate opportunity to present their objections. The first argument which defendants nake is a technical one: that the notice which they received was not invalid because they had not received the summons and complaint, and hence, were not parties at the time the notice of the pratiminary injunction proceedings was received. We find this contention to be without merit. <u>SUC v. Dumont</u>, 49 F.R.D. 342 (S.D.N.Y. 1969). Notice was effectively given even though technically these defendants were not yet properly served with the summons and complaint. We disagree with the SEC's contention upon oral argument, however, that it is unnecessary to have

preliminary injunction. If this Court lacked personal jurisdiction over these defendants, then the injunction would be void as to them. SEC v. Dumont, 49 F.R.D. 342 (S.D.N.Y. 1969); 7 MOORE Federal Practice 160.25[2] (2d ed. 1974). We find, however, that there was personal jurisdiction over the parties at the time the injunction was entered five days after service of the summons and complaint.

Defendants next contend that the notice itself was insufficient. Notice can be insufficient because it does not sufficiently apprise a defendant of a scheduled hearing or of the facts involved in the claim against him. On the other hand, notice can be inadequate because it provides insufficient time to prepare a defense. Neither of these contentions is applicable here.

School Board v. United States, 415 F.2d 817 (5th Cir. 1969), is relevant here. We agree. In Plaquemines, complaining defendant had been joined as an additional party in the action and alleged it had no notice of government's intention to proceed on a motion for a preliminary injunction. The Fifth Circuit held that a temporary restraining order and a show cause order which had been served personally with an amended complaint upon defendant and its individual members constituted sufficient notice. "These papers fully advised the Commission Council and its members of the nature of the claim against them and of the plaintiff's

application for a preliminary injunction." 415 F.2d at 824.

Thus the court found that the order to show cause gave defendants sufficient notice of the preliminary injunction hearing. In Plaquemines, defendants received the summons and complaint together with the TRO and show cause order, while in the instant case defendants were not served with the summons and complaint until September 19, 1974, some fifteen days after the TRO papers and four days before entry of the preliminary injunction. Nevertheless, we find that the papers served upon defendants sufficiently apprised them of the facts involved in this case and therefore gave them adequate notice in that respect.

Further, enough time was afforded to prepare for the hearing. Ariel Gutierrez was notified by telephone on September 3, 1974. While we would not find this communication alone to be sufficient notice, copies of the TRO and order to show cause were sent to both Ariel and Enrique Gutierrez on September 4, 1974. This provided defendants with sufficient notice of the hearing and afforded them an opportunity to appear and to be heard. Rule 6(d) of the Federal Rules of Civil Procedure provides that motions on notice should give such notice not later than five days before the time specified for the hearing. Rule 6(e) further provides that if such notice is sent by mail, three additional days should be allowed. We find that defendants here had at least the required eight days notice.

^{2/} Since Ariel Gutierrez is chairman of the board and Enrique Gutierrez is president of ERG, the corporate defendant received notice and was properly served. Rule 4(d)(3) of the Federal Rules of Civil Procedure.

notice, this hearing on defendants' application to set aside the preliminary injunction and appointment of a receiver has effectively vitiated any inadequacies in the notice afforded for the previous hearing, since defendants have now had an opportunity to present any argument they may have had against its entry. See Banke v. Novadel-Agene Corp., 130 F.2d 99 (2d Cir. 1942), cert. denied 317 U.S. 692 (1942). Cf. American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932).

For all the above reasons, the injunction issued by this court on September 24, 1974 is binding on the EHG group defendants and on all the defendants named therein.

SO ORDERED.

United States District Judge

Dated: New York, N. Y. December 31, 1974.

STATE OF NEW YORK : SS. COUNTY OF RICHMOND) ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Righmond Avenue, Staten Island, N.Y. 10302. That on the Boder of Smarel in this action, at 600 North leasts

the address designated by said attorneyes for that purpose by depo the address designated by said attorneys; for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York. ROBERT BA worn to before me, this 13 day of March Notary Public, State of New York

Qualified in Richmond County

No. 43-0132945

Commission Expires March 30, 1976

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
"UNTY OF RICHMOND ss.:

deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the day of Mary 197 sat No 26 February 196 Staten Island, N.Y. the within a party of the within a party of the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the posen mentioned and described in said papers as the Copy therein.

Sworn to before me, this 13 day of much 1975

Edward Bailey

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1973

SOUTHERM 10

